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Supreme Court, U.S.
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APPENDIX

In the Supreme Court of the United States

TERM, 1971

No. 70-5012

GEORGE WILLIAM MILTON, *Petitioner,*

v.

LOUIE L. WAINWRIGHT, *Director, Florida Division of Corrections*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI AUGUST 13, 1970
CERTIORARI GRANTED JUNE 7, 1971

In the Supreme Court of the United States

TERM, 1971

No. 70-5012

GEORGE WILLIAM MILTON, *Petitioner*,

v.

LOUIE L. WAINWRIGHT, *Director, Florida Division of Corrections*

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INDEX

	Page
Record from the U.S.D.C. for the Southern District of Florida	
Docket Entries	1
Petition for writ of habeas corpus, No. 69-705-Civ-CF, dated June 5, 1969 and filed June 11, 1968	5
Appendix—Opinion of the U.S.C.A. for the Fifth Circuit in the first federal habeas corpus case, *Milton* v. *Wainwright*, No. 25612, June 5, 1968, Chief Judge Brown	11
Transcript of Evidentiary Hearing held September 26, (excerpts)	14
Unreported opinion of the U.S.D.C. for the Southern District of Florida in the first federal habeas corpus case, *Milton* v. *Wainwright*, No. 67-234-Civil-CF	14
Stipulations of counsel for Petitioner and Respondent as to history of the case and factual matters	19
Opinion and judgment, dated and filed November 6, 1969, Chief Judge Charles B. Fulton	25

Page

Order directing that the two-volume Circuit Court record transcript be filed as an exhibit with the records in this case, dated December 22, 1969 and filed December 23, 1969 33

Opinion of the U.S.C.A. for the Fifth Circuit, No. 29064, dated June 23, 1970 34

Judgment of the U.S.C.A. for the Fifth Circuit, No. 29064, dated June 23, 1970 37

Order of the U.S.C.A. for the Fifth Circuit, No. 29064, dated July 16, 1970, denying rehearing 38

Transcript of record and transcript of testimony in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, No. 1904-H 39

Indictment for first degree murder, filed July 1, 1958 39

Testimony of Archie Langford—direct 41

—cross 51

Testimony of George Milton—direct 55

Testimony of Archie Langford, Jr. (recalled)—direct 59

—cross 72

Testimony of William Paul McClure—direct 91

—cross 98

Testimony of Warren D. Holmes—direct 109

—cross 111

Testimony of George Milton—direct 121

—cross 134

Testimony of William F. McClure (recalled)—direct 144

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari 149

69-705-Civil-CF 69-705-Civil-JE

CIVIL DOCKET

UNITED STATES DISTRICT COURT

TITLE OF CASE	ATTORNEYS
GEORGE WILLIAM MILTON, #64891	For plaintiff: In proper person Florida State Prison Raiford, Florida
VS	
LOUIE L. WAINWRIGHT,	

Habeas Corpus: Alleges involuntary confession.

DATE	NAME OR RECEIPT NO.
Jun 11 1969	Forma Pauperis

69-705-Civil-CF

Date	Proceeding	JS-5	Date Order or Judgment Noted
1969			
June 11.	Petition for Writ of Habeas Corpus. Copy to Seigendorf. X-Cards	1	1-48
June 13	ORDER to show cause- Respondent file memo of law no later than 7-3-69 to show cause why petition should not be granted. (6-13-69) (CF)	2	49
July 3	Memo filed by Atty-General.	3	50-55
July 10	ORDER: 1. An evidentiary hearing to be held 9/26/69 @ 9 a.m. 2. At least two week priors to hearing, State shall notify Ct. in writing of names of witnesses it will call, and approximate time hearing will take. 3. Bruce E. Lazar, Esq. appointed to represent petitioner at this hearing. (7/9/69-CF)	4	56-58
Aug. 19	Petitioner's motion to Dismiss Appointment of Counsel and Motion to Postpone Evidentiary Hearing Pending Appeal.	5	59-65
Sep. 9	ORDER: Petitioner's Motions, DENIED. (9/9/69-CF)	6	66-67
Sep. 19	Writ of Habeas Corpus Ad Testificandum as to Deft, George William Milton on 9/22/69. (9/19/69-CF)	7	68-69
Oct. 8	Motion for Transcript of Hearing by Geo. W. Milton	8	70
Oct. 8	ORDER: Motion of Petitioner For Transcript of Hearing Granted (10/7/69-CF)	9	71
Oct. 23	Transcript of Evidentiary Hearing 9/26/69	10	72-141

Date	Proceeding		Date Order or Judgment Noted
Nov. 6	ORDER: Petition for writ of habeas corpus is DENIED. (Note: Findings of Fact and Conclusions of Law incorporated in Order.) (11/6/69-CF) R90	11	142-150
Nov. 20	Application for Certificate of Probable Cause filed by Petitioner George William Milton for an Appeal to USCA from the Order of Dist.Ct. entered 11/6/69, denying the Petition for a Writ of Habeas Corpus.	12	151
Nov. 20	Motion for Leave to Appeal in Forma Pauperis, filed by Petitioner.	13	152
Nov. 20	ORDER: Hereby Certified that Probable cause exists in the within proceeding for an appeal. (11/19/69-CF).	14	153
Nov. 20	ORDER: Petitioner in the proceeding is hereby permitted to prosecute said appeal in the action to conclusion without prepayment of fees or costs or security therefor. (11/19/69-CF).	15	154
Dec. 3	Notice of Appeal filed by Petitioner G. W. Milton. (Certified copies of order F.P. & Probable Cause; Notice of Appeal M1d. to USCA; Atty. Gen. McCrary; B. E. Lazar, Esq; G. W. Milton, Pet.)	16	155
Dec. 23	ORDER: That the Two-Volume Circuit Court Transcript Be Filed with The Records of This Cause. (12/22/69-CF)	17	156

Date	Proceeding	Date Order or Judgment Noted	
Dec. 23	State Court Transcript (2 volumes) filed as exhibit to state's response.		
'70 Jan. 7	Notice of Appeal and Order appointing C/A Counsel, *Certified* mld. USCA.		
Jan. 12	Clerk's Certificate.	17a	157

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Persons in State Custody

GEORGE WILLIAM MILTON, No. 64891
Full name and prison number
(if any) of Petitioner

vs

LOUIE L. WAINWRIGHT
Name of Respondent

No. 69-705-Civ-CF

PETITION FOR WRIT OF HABEAS CORPUS

[Filed, June 11, 2:54 PM '69, JOSEPH I. BOGART, *Clerk*]
[Filing Fee, In Forma Pauperis, J. I. BOGART, *Clerk*]

INSTRUCTIONS

(Read Carefully—Must be filed in Triplicate)

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or add an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and both copies* shall be mailed to: Clerk, United States District

Court, Southern District of Florida, P.O. Box 669, Miami, Florida.

1. Place of detention: Florida State Prison, Raiford, Florida.
2. Name and location of court which imposed sentence: Circuit Court of Record, Dade County, Florida.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) indictment No. 1904-H felony murder
   (b) ----------
   (c) ----------
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) December 12th, 1958. Term of life imprisonment
   (b) ----------
   (c) ----------
5. Check whether a finding of guilty was made
   (a) after a plea of guilty
   (b) after a plea of not guilty ✓
   (c) after a plea of nolo contendere
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury ✓
   (b) a judge without a jury
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. District Court of Appeal, Third District
      ii. Supreme Court of Florida
      iii. ----------
   (b) the result in each such court to which you appealed:
      i. Appeal dismissed without opinion
      ii. Petition For Certiorari denied without opinion
      iii. ----------
   (c) the date of each such result:
      i. June 28, 1960
      ii. November 29, 1960
      iii. ----------

(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. Milton vs. State, 121 Fla. App. So. 496 (1960)
ii. Milton vs. State, 125 Fla. So. 880 (1960)
iii. ----------

9. If you answered "no" to (7), state your reasons for not so appealing:
(a)
(b)
(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
(a) Custody is unlawful because the same is based upon a judgment and sentence which was founded in part upon a confession which was inadmissible in evidence, because of being "involuntary"
(b) Petitioner was denied his Fourteenth Amendment right to Procedural Due Process of Law, and to receive a fair trial when the said confession was admitted into evidence over the appropriate objection of defense counsel.
(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):
(a) The allegations and Federal Constitutional Claims for relief are based conclusively upon the State Court Transcript. The arguments presented in connection with each of these allegations are set forth in a memorandum of law attached hereto.
(b)
(c)

12. Prior to this petition for you filed with respect to this conviction
(a) any petition in a State of Florida court under the provisions of Criminal procedure Rule 1 of the Florida Supreme Court? YES
(b) any petitions in State or Federal courts for habeas corpus? YES
(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (3)? NO

(d) any other petitions, motions or applications in this or any other court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

i. Motion Under Provisions of Criminal Procedure Rule One.

ii. Appeal, from the order denying the Rule One Motion.

iii. Petition For Writ of Habeas Corpus.

iv. ----------

(b) the name and location of the court in which each was filed:

i. ----------

ii. Circuit Court of Record, Dade County, Florida.

iii. District Court of Appeal, Third Dist. Miami, Fla.

iv. Supreme Court of Florida, Tallahassee

(c) the disposition thereof:

i. Motion Under Criminal Procedure Rule One, denied

ii. Appeal was dismissed without written opinion

iii. Petition For Habeas Corpus, denied without opinion

iv. ----------

(d) the date of each such disposition:

i. July 12th, 1965, case No. 1904-H

ii. January 13th, 1966, case No. 65-812

iii. March 3rd, 1966, case No. 35, 173

iv. ----------

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Milton vs. State, 181 So.2d 751 (Fla. App. 3rd (1966)

ii. Milton vs. Wainwright, 188 So.2d 312 (Fla. Sup. 1966)

iii. ----------

iv. ----------

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? YES

15. If you answered "yes" to (14), identify
    (a) which grounds have been previously presented:
        i. alleged involuntary confession
        ii. denial of Fourteenth Amendment's right
        iii. ----------
    (b) the proceedings in which each ground was raised:
        i. Motion Under Criminal Procedure Rule One
        ii. Appeal, from the order denying the Rule One Motion
        iii. Petition For Writ of Habeas Corpus

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
    (a) ----------
    (b) ----------
    (c) ----------

17. Were you represented by an attorney at any time during the course of
    (a) your arraignment and plea? YES
    (b) your trial if any? YES
    (c) your sentencing? YES
    (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
    (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list
    (a) the name and address of each attorney who represented you:
        i. Mr. Ray Sandstrom.
        200 South East 6th St. Fort Lauderdale, Fla.
        ii. ----------
        iii. ----------
    (b) the proceedings at which each such attorney represented you:

i. Petitioner was represented by counsel
ii. in only the proceedings set forth in
iii. paragraph No. (8) of this form

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? YES

/s/ George William Milton
Signature of Petitioner

State Of Florida } ss

----------, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ George William Milton
Signature of Affiant

SUBSCRIBED *and* SWORN to before me this
5 day of June, 1969.

/s/ Illegible
Notary Public

My commission expires:
Notary Public, State of Florida at Large
My Commission Expires, Feb. 26, 1971
Bonded through Fred W. Diestelhorst.

APPENDIX TO PETITION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25612

GEORGE W. MILTON, *Appellant*,

versus

LOUIE L. WAINWRIGHT, *Director*,
Division of Corrections, State of Florida, *Appellee*,

Appeal from the United States District Court for the Southern District of Florida.

(June 5, 1968.)

Before BROWN, Chief Judge, WISDOM, Circuit Judge, and BREWSTER, District Judge.

BROWN, CHIEF JUDGE: Appellant, who is presently serving a life sentence imposed on December 12, 1958, for murder, seeks habeas relief from that conviction and sentence. The Federal District Judge, without holding an evidentiary hearing but on the basis of the State Court transcript, denied the relief sought. Appellant here contends that his conviction was constitutionally void because an oral confession as a matter of law was not voluntary and, in any event, it was introduced against him at trial without proper procedural safeguards being taken to determine

the voluntariness of that confession.[1] We affirm but not for the reasons given by the Court below and certainly not by ruling on the intrinsic merits of these claims.

The facts from the State Court transcript are not at this juncture very much disputed. Appellant was arrested and indicted for murder. At this time Appellant had retained Counsel. A scheme was set up in which a police officer disguised as a prisoner was placed in a two-man cell with Appellant for about two days but Appellant was not informed of the officer's true identity. The officer questioned Appellant about his crime and obtained from him the oral confession of the murder of his wife. that was introduced against Appellant at trial.

For reasons which we shall shortly state we do not pass upon the merits of this attack. Nor do we, for that matter, intimate even a possible whisper of a suggestion of how it will or should come out. But not withstanding this disclamer it was only realistic to suggest that a long line of Supreme court cases[2] all raise very grave doubts as to the voluntariness or admissibility of a confession obtained by trickery in this manner. But although Appellant has challenged voluntariness of the confession in the Florida Courts he has failed to present these particular factual contentions regarding this confession to the State Sentencing Court either by appeal or by motion to vacate judgment under Florida post-conviction procedure of Rule No. 1, F.S.A. s924 Appendix, Rule 1; In re Criminal Procedure Rule No. 1, Fla., 1963, 151 So. 2d 634. Thus he has not exhausted an available state post-conviction remedy as required by 28 U.S.C.A. 2254.

This raises question for us to the action now to be taken by us. Should we try to decide this on materials which have

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[1] Our disposition of the case makes it unnecessary for us to reach the question about the constitutionality of the method used to determine the voluntariness of the confession at Appellant's State trial under the ruling in Jackson v. Denno, 1964, 378 U.S. 368, 84 S. C. 1774, 12 L. Ed. 2d 908.

[2] See, e.g., Leyra v. Denno, 1954, 347 U.S. 556, 74 S. Ct. 716, 98 L. Ed. 948; Spano v. New York, 1959, 360 U.S. 315, 79 S. Ct. 1201, 3 L. Ed. 2d 1265; Massiah v. United States. 1964, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246; Escobedo v. Illinois, 1964, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 977; Miranda v. Arizona, 1966, 348 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694; and Johnson v. New Jersey, 1966, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

a remarkable, if not quite adequate, completeness? Should we send it back to the Federal District Court to evaluate and make the requisite findings? Or should we, in the interest of genuine working comity put the fact-finding responsibility as to this new factual thesis squarely on the Florida Courts where, initially at least, it belongs? On this we have no doubt. We are now committed to the fullest exploitation of the many new and urgently needed state post-conviction remedies.

In the long run, time is saved and constitutional rights are better vindicated by assuring that state mechanisms to ascertain and find facts are fully used. We reject again, as we have so many times recently the beguling appeal of remanding it for the Federal Judge to do what is initially the clear duty of the State Court. See Texas v. Payton, 5 Cir., 1968, . . . F. 2d . . . . (No. 24326, February 12 1968); accord, Beto v. Conley, 5 Cir., 1968, . . . F. 2d . . . (No. 24907, April 3, 1968); cf. Mobley v. United States, 5 Cir., 1967, 379 F. Ed 768. This is not abdication. To the contrary it effectuates the Supremacy Clause in a vivid way to (a) place initial responsibility where it belongs and (b) hopefully by fact ascertainment and finding the constitutional claim will be recognized by the state court or, if not, (c) the Federal Court will have an adequate record on which to make the inescapably independent judgment on the facts. See 28 U.S.C.A. 2254, as amended Nov. 2, 1966, Pub. L. 89-711, 2 Stat. 1105.

The result is that the judgment of the District Court is affirmed but this is without prejudice to Appellant to reapplying for relief in the state Court under the proper post-conviction procedures.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 69-705-Civ-CF

The above-entitled cause came on for Evidentiary Hearing before Chief Judge Charles B. Fulton, on Friday, September 26, 1969, pursuant to Notice.

The earlier case is designated as Case No. 67-234-Civil-CF, and, of course, is entitled "George William Milton, Petitioner, versus Louie L. Wainwright, Director, Division of Corrections, State of Florida."

The Opinion which the Court there entered is as follows:

"Petitioner was tried before a jury in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, on a charge of first degree murder. At trial, testimony concerning an oral confession and a written confession were offered in evidence. Defense counsel objected on the ground that the confessions were involuntarily given. The trial judge heard lengthy testimony on the issue of voluntariness, ruled that both confessions were made voluntarily, and permitted both to be introduced in evidence. The jury returned a verdict of guilty with a recommendation of mercy, and the court sentenced petitioner to life in prison.

"Petitioner alleges that the oral confession was inadmissible because obtained by coercive methods and therefore involuntarily given. This allegation was heard and determined adversely to petitioner by the trial judge at his original trial. Under 22 U.S.C. Sec. 2254 this determination is presumed correct. Petitioner has not shown and it does not otherwise appear that there is any sufficient ground to overcome that presumption. The opportunity afforded petitioner at his trial to establish the alleged involuntary character of the confession comported with the most recent decisions outlining the requirements of due process.

"In *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964), the United States Supreme Court emphasized:

" 'The defendant's constitutional right at some stage in the proceedings to object to the use of the

confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.'

"The transcript of the record in this case establishes that the trial judge heard testimony out of the presence of the jury, including direct and cross examination of the state's witness and testimony by petitioner himself, prior to making his finding that the oral confession was voluntary. This testimony and finding comprises twenty-eight pages of the transcribed record. The procedure afforded to petitioner at his trial in 1959 was declared by the Supreme Court in *Jackson v. Denno, supra*, to be the desirable practice for the determination of admissibility of confessions by state courts in cases subsequent to the 1964 Denno decision:

" 'It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence.'

"Petitioner was given the benefit of such a prior determination in 1959. Nor did the effort to comply with all requirements of due process stop at that point. When the jury was recalled, and the state's witness allowed to testify as to the oral confession, defense counsel was allowed to conduct an exhaustive cross examination of this witness comprising some thirty-five pages of the record. Further, at the conclusion of closing arguments, the court charged the jury that they should determine whether the confession was freely and voluntarily made by the petitioner and that if they did not determine the confession to be voluntary they should exclude such involuntary statement from their consideration of petitioner's guilt or innocence, but even if voluntary it should be received and considered 'with great caution', particularly if made after the petitioner was incarcerated and under arrest. The jury was further charged that in making their determination of the credence to be given to such confession

all of the circumstances surrounding its utterance, including the motives which may have operated on the petitioner and including the harmony or inconsistency in itself or with other evidence in the case should be 'fairly and fully' considered.

"It is difficult to imagine how this trial judge could have been more zealous in his effort to follow acceptable procedure in making his determination that the confession was admissible as evidence of petitioner's guilt and in charging the jury in a fashion most likely to give petitioner every benefit of any reasonable doubt.

"Not only did the trial judge follow acceptable procedure in making his determination of the voluntary character of the confession before admitting it into evidence before the jury, but the record substantiates his finding. In *Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966), the Supreme Court spoke of the duty of a federal court in a collateral proceeding wherein the question whether a confession was involuntarily given is raised,

> "'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.'

"The Supreme Court emphasized that although the requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966) that a defendant be advised of his right to counsel and given certain warnings at the outset of interrogation was declared nonretroactive by *Johnson v. New Jersey*, 384 U.S. 719 (1966),

> "'this does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long' prior to our decisions in *Miranda* and *Escobedo v. Illinois*, 378 U.S. 478 (1964).'

It thus becomes this Court's duty to determine what those standards of voluntariness were and whether they were met in this case. The test of admissibility of confessions as voluntary has been variously stated, but

the requirement basically is that a confession must be the product of rational intellect and free will rather than being induced by conduct of state officials which might tend to overbear the defendant's will to resist, thus constituting coercion. *Townsend v. Sain*, 373 U.S. 293 (1963); *Bynumn v. State of Illinois*, 373 U.S. 528 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961).

"In this case petitioner was indicted for first degree murder for the death of his wife and was incarcerated in the Dade County Jail pending trial. The State's witness, a police officer, was placed in the cell with petitioner, who was told that the officer was being held on investigation of a murder charge. The officer remained in the cell with petitioner one night, the following day, and part of a second day. During that time the petitioner was not told of his cellmate's connection with the police force. Under instructions from his superiors, the officer questioned petitioner as opportunities presented themselves in an effort to elicit from him evidence concerning the crime. The testimony of this police officer as to statements made to him by petitioner during this period of joint incarceration comprise the oral confession which petitioner alleges was involuntary.

"Petitioner was a twenty-three year old colored man represented by counsel at the time this confession was made. Although counsel was not present during the confession, presumably he had been cautioned by his attorney to be cautious about making any statements concerning his crime. He was neither a minor nor retarded nor physically abused in any manner, as was the defendant in *Reck v. Pate*, 367 U.S. 433 (1961). It is true that petitioner was deceived by police officers into falsely placing confidence in his cellmate. But he was acquainted with this supposed fellow-prisoner for no more than forty-six hours. This is far from the situation in *Spano v. People of the State of New York*, 360 U.S. 317 (1959). In that case the defendant was confronted at 3:00 A.M., after eight hours of interrogation during which his repeated requests for an attorney were denied, by a policeman who had

been his life-long friend. He had previously confessed to this supposed friend by telephone and the officer managed at that late hour to falsely convince the exhausted defendant that his call had endangered the officer's job and that the welfare of the officer's wife, three children, and unborn fourth child depended on the defendant's repetition of his confession. This case bears no resemblance to those facts.

"Here the petitioner freely chose to trust a man whom he had known for a matter of hours. Nor, indeed, are the facts of this case similar to the deception employed by the police in *Leyra v. Denno*, 374 U.S. 556 (1954). In that case the defendant had been subjected to days of intensive police questioning and was suffering from an acutely painful sinus attack. In response to his request for medical attention for his sinus condition, he was told that a 'Dr. Helfend' would give him medical relief. Dr. Helfend was in reality a psychiatrist who managed after lengthy questioning and encouraging the defendant to unburden his soul, to elicit from him a confession. In this case the pretended cellmate did not offer medical or spirual aid to petitioner or subject him to an over-powering barrage of questions. Indeed, he very carefully refrained from seeming overanxious to secure information from petitioner in the effort not to arouse suspicion concerning his motives.

"In *Massiah v. United States*, 377 U.S. 201 (1964), the Supreme Court wrote a cogent opinion denouncing the use in evidence of incriminating statements deliberately elicited by government agents after an accused had been indicted but in the absence of his retained counsel, as an abuse of the prisoner's right to counsel embodied in the Sixth Amendment to the Federal Constitution. But the facts in *Massiah* differ significantly from this case. In *Massiah*, government agents installed a radio transmitter in the car of the defendant, who was under indictment on a federal narcotics charge but was free on bail. The use of statements by accused obtained through this device was condemned as a violation of his right to counsel. There is a compelling

difference between a man talking to someone he trusts, completely unaware that third parties are able to hear his conversation, and one who voluntarily, albeit foolishly, chooses to confide in a man whom he knows scarcely at all.

"Despite the recent trend of decisions indicating that state officials will be held to an ever stricter standard in their interrogation of persons accused of crime, it is apparent that the methods utilized in the effort to arrive at truth in the investigation of the crime of which petitioner stands convicted comported fully with the requirements of due process.

"Therefore it is

"ORDERED and ADJUDGED that Petitioner's petition for writ of habeas corpus be and the same is hereby denied.

"DONE And ORDERED at Miami, Florida this 15th day of September, 1967. Charles B. Fulton, Chief Judge."

[26] Now, we are assembled here for the purpose of conducting the evidentiary hearing previously ordered; but before we do that, I want counsel for both sides to stand and agree or disagree with each other or with the Court that the Court has narrated at this hearing the history of this proceeding, and the one that preceded it in this Court and has made accurate reference to the various orders and other matters that are involved.

Counsel for the petitioner, is that so?

MR. LAZAR: Your Honor, I think that your Honor's statement is correct.

THE COURT: Mr. McCrary?

MR. MCCRARY: So stipulated, sir.

THE COURT: Is there anything that has been omitted that is sequential with respect to the present posture of this matter in this Court?

[27] MR. LAZAR: Not from the petitioner——

MR. MCCRARY: I don't know if it is important, your Honor, but I don't recall you saying that the petitioner did file a Motion of some kind with this Court to get an Interlocutory Appeal.

THE COURT: This Order recites that. I didn't say that because the Order that has been dictated recites that.

Now, gentlemen, you may proceed.

MR. LAZAR: Before we proceed with an evidentiary hearing, may I be permitted to make a brief statement to the Court?

THE COURT: Of course.

MR. LAZAR: Your Honor, as the Fifth Circuit has recognized, the facts in the main in this case, are not very much in dispute. It is undisputed that the Petitioner was indicted on July 1, 1958 and that on July——

THE COURT: In the State Court.

MR. LAZAR: In the State Court, and that on July 18 of that same year, the State entered upon, as the Fifth Circuit has mentioned, a scheme whereby a police officer was placed in the cell with the petitioner, and secured from the petitioner certain incriminating statements which were then admitted into [28] evidence as an oral confession at the petitioner's trial in the State Court.

Now, with respect to——

THE COURT: May I interrupt you right there?

MR. LAZAR: Yes, sir.

THE COURT: To read one paragraph from the opinion of the Court of Appeals, to see if you are in total agreement with it, with that Court's finding of the facts or the state of the record, that paragraph reads as follows:

> "The facts from the State Court transcript are not at this juncture very much disputed. Appellant was arrested and indicted for murder. At this time Appellant had retained counsel. A scheme was set up in which a police officer disguised as a prisoner was placed in a two-man cell with Appellant for about two days but Appellant was not informed of the officer's true identity. The officer questioned Appellant about his crime and obtained from him the oral confession of the murder of his wife that was introduced against Appellant at trial."

[29] MR. LAZAR: The petitioner would agree with those facts and that those facts are undisputed, sir.

THE COURT: Does the State of Florida agree with that?

MR. MCCRARY: Yes, sir.

MR. LAZAR: It is on the basis of those undisputed facts that—with respect to the merits of this claim, the petitioner would agree at this juncture to rely upon the record established in the State trial court; and upon that record, your Honor, I believe that I have compiled a series of cases which conclusively show that at the present time the petitioner is being held unlawfully in the Raiford State Prison, contrary to his Constitutional Right and that this Court should grant the Writ, Petition for same.

Some of the cases that I will cite to your Honor, with the Court's permission, occurred either so close to the Court's opinion in 1967, or after that opinion, that it is quite possible, with due respect to the Court that those opinions were not considered by the Court in its Order.

I believe that if I would be permitted to argue the petitioner's case, on the undisputed [30] evidence and facts, as we so stipulated, that these cases will conclusively show that the petitioner is now wrongfully being held in the prison.

THE COURT: In connection with what you have just said, I refer again to that portion of the opinion of the Court of Appeals, which was read just a moment ago and which, among other things said, and I quote—

> "The facts from the State Court transcript are not at this juncture very much disputed."

Now, do I understand from your statement that they are not at all disputed?

MR. LAZAR: Your Honor, I think that at the State trial it was disputed that the confession elicited was not a truthful confession, but the question of truth or falsity of the confession plays no part in this hearing.

THE COURT: That is not what the Judge meant, the Chief Judge, when he wrote this Opinion.

He says that "The facts from the State Court transcript are not at this juncture very much disputed."

In other words, it is agreed that the transcript correctly and completely relates all of the [31] facts that went into the dispute in the State Court. Do you agree with that?

MR. LAZAR: We agree here with respect to this claim.

THE COURT: Are you now stating that there are no disputed facts that you know of that are salient to the resolu-

tion of this petition for a Writ of Habeas Corpus in this Court?

MR. LAZAR: Your Honor, I have read the record four times. I have discussed it with the petitioner. I do not know of any other material facts that could be brought out at an evidentiary hearing.

THE COURT: Stated differently, having read the record four times, and having devoted yourself to preparation for this hearing, you know of no facts that can be developed here today that are not already in that record; is that what you are saying?

MR. LAZAR: Not to my knowledge. I believe that the facts already in the record conclusively indicate that the petitioner's rights have been violated, contrary to the Constitution——

THE COURT: What you are saying is that if we stayed here all day with live witnesses, you know of no facts that could be developed, that are not already present in this record; is that correct?

[32] MR. LAZAR: I have not talked with the State's only witness. The only witness, in my estimation that would be material would be Mr. Lankford, who testified at the State trial.

I believe that what he said at the State trial could be stated differently, but I am not sure that anything could be added to what he said at the State trial.

THE COURT: Then, to go back to the statement which you made a moment ago, you know of no issue of any kind, fact or law, that exists at this time, except the voluntariness of that confession and its admissibility in the trial at the State Court; is that correct?

MR. LAZAR: It is in part, your Honor. I would not state that the question goes only to voluntariness. I think that there may be a semantic difference, but I think that the United States Supreme Court, in the Massiah case, has distinguished incriminating statements under the circumstances in this case and Massiah from those which are, in fact, involuntary.

I think that the Massiah case stands for the proposition that statements obtained after indictment, without the aid

of counsel, are obtained [33] contrary to the Fifth and Sixth Amendments and the Fourteenth Amendment.

THE COURT: All right.

To state it another way, it is your position today that this case is in a posture to be resolved solely upon the law question of the validity of that confession?

MR. LAZAR: With respect to the merits of the claim, that is correct, Judge.

THE COURT: Do you agree with that, Counsel for the State?

MR. MCCRARY: Your Honor, the State is of the opinion that— With complete candor, with the Court, the State doesn't believe that there can be "anything gained" from an evidentiary hearing or nothing new could be brought out in this hearing that is not already in the record.

I will represent to the Court that the State's witness, Mr. Lankford—his testimony today will be the same testimony that he gave at the trial court on the State level and it will not vary, and I have already discussed this with opposing counsel, that his testimony is going to be identical, maybe not word for word, but that the general context would be the same and the questions that I would propose to [34] ask him would be the same questions that were asked at the trial court to establish the voluntariness or the involuntariness of the confession made by the Petitioner, the defendant at that level.

So, I am of the opinion that—not I am of the opinion—the State is of the opinion that the question to be decided here is really a question on the law, of applicable cases applied to the facts that we already have in the record.

MR. LAZAR: If I may make this one reflection, your Honor, that the only possible difference that I can foresee is that my cross examination of Mr. Lankford, although perhaps not bringing out any additional material facts, may, with respect to the voluntariness issue, if the Court reaches that issue—and I don't believe that is necessary—but my cross examination of Mr. Lankford, perhaps, could restate some of the points that were made at the State trial.

THE COURT: I am going to, of course, give you a full opportunity to state all of these cases and to argue them,

but what I am trying to decide at this moment is what, if anything, can be accomplished by calling this witness to the witness stand for a direct and cross examination.

[35] Is he available?

MR. MCCRARY: Yes, your Honor.

THE COURT: Mr. Lazar, do you want him called?

MR. LAZAR: Your Honor, we will rely on the record of the State Court.

THE COURT: Entirely?

MR. LAZAR: Yes, sir.

THE COURT: Now, you know that this man is available and ready to testify, of course?

MR. LAZAR: Yes, sir.

MR. MCCRARY: The State's position is that we can introduce nothing more than what is in the record, and his testimony would be essentially the same as it was in the record in the State Court.

However, the State is prepared to put him on, if necessary, your Honor.

THE COURT: In other words, counsel for both sides agree that at this evidentiary hearing, neither of them know of anything that can be adduced that would add anything to the already existing State Court record; is that correct?

MR. MCCRARY: Your Honor, I say that with absolute candor.

THE COURT: And you do, too, Mr. Lazar?

[36] MR. LAZAR: That's correct.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

GEORGE WILLIAM MILTON,
Petitioner,

v.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida,
Respondent.

No. 69-705-Civ-CF
OPINION

[Filed, Nov. 6, 1969, JOSEPH I. BOGART, *Clerk.*]

Beginning in June of 1957 George William Milton told friends he was going with a girl named Minnie Lee Claybon who had a steady job and gave him money. He didn't like her, he said, because she was ugly, and he'd rather not be seen on the streets with her, but he liked her money. George was a boxer. He was going to be a champion, he said, another Joe Lewis. He had the build for it, at 6 feet 2 inches, and 185 pounds. All he needed was Minnie's money so he could buy equipment and finish training. In March of 1958 George and Minnie rented an apartment together in Miami. George asked the landlord if he knew of a good insurance company. During March and April of that year George took out three life insurance policies on Minnie, with a combined value of $8,500, payable in the event of accidental death. George didn't have much money. In fact at one point he had to hock some clothes for $2.00, but he kept those insurance premiums paid. During those same two months George repeatedly contacted his girlfriend, Lucille Williams, telling her he would soon be coming into a lot of money and would meet her in New York, where they would be married.

Late in the afternoon of May 31, 1958, George bought a cheap, eight-year old car. The back doors were equipped with safety devices which could be used to seal them from the outside so that children couldn't get out. George and Minnie had no children, although Minnie was several months pregnant. Sometime that night George secured

the safety locks so that the rear doors, which had been open when he bought the car, were sealed. He took Minnie out that evening, and it was very late when they returned home. Minnie had been drinking and was asleep. George put her into the back seat and drove to the Miami River. There, in the predawn of June 1, he aimed his car at the only portion of river bank in the area not blocked by pilings or boats, a seventeen foot gap, put the machine into high gear, stepped on the accelerator, and jumped clear just as the car went into the river. His shoulder was hurt by impact with the ground, causing him to roll into the river, from which he was rescued several moments later by a boat captain roused by his shouts. Minnie, if she ever woke up, found herself trapped with windows closed and doors sealed. But that was all right, according to George, because Minnie was only a young Negro girl and the law doesn't care how many Negroes get murdered. Besides, he had committeed the perfect crime, with no witnesses, as he later bragged.

This was the tale the witnesses told at the three-day first degree murder trial in November, 1958. The jury returned a verdict of guilty, with a recommendation of mercy, and the Court sentenced George to life in prison. That was eleven years ago, and as the years have passed George Milton has petitioned and re-petitioned both Florida and Federal Courts in his efforts to overthrow this conviction. So numerous have been his court proceedings that in its response to an earlier habeas corpus petition filed in this Court, Case No. 67-234-Civ-CF, the State despaired of its normal practice of delineating prior history of a habeas corpus claim and merely noted that such recital in this case "... would unnecessarily burden this Court to wade through the matters."

Milton charges that he would not have been convicted if the State had not been allowed to introduce into evidence an oral confession, which he claims was involuntary. In the earlier habeas corpus proceeding before this Court, the State acknowledged the facts to be as petitioner alleged, and furnished a transcript of his trial, which included an extensive hearing on his voluntariness claim. Believing that all pertinent facts had been brought out at petitioner's trial, this Court considered the merits of the petition and

enered an Order denying the relief sought. Because important Constitutional questions are involved, this Court certified that probable cause existed for an appeal of its Order. The Fifth Circuit Court of Appeals did not review the merits of petitioner's claim, holding instead that Milton had not exhausted his State remedies, despite the State's assertion that he had. The Court of Appeals affirmed the decision of this Court but suggested that Milton reapply for State relief. *Milton v. Wainwright*, 396 F. 2d 214 (5 Cir. 1968). Milton has now done this. On September 3, 1968, the sentencing court denied relief under a *Fla.R.Crim.P.* 1.850 motion, without hearing, having considered only the records and files in the case. Thereafter, the Florida Supreme Court refused to docket Milton's State habeas corpus petition on the ground that the rules of that Court do not require the docketing of successive petitions upon issues previously determined in that or any other Court.

This Court thus found itself in exactly the same position as it was before ruling upon the previous petition, except that this time the Court of Appeals had said that the available materials had a "remarkable, if not quite adequate completeness." *Milton v. Wainwright, supra* at 215. The State was given an opportunity to hold an evidentiary hearing and refused to do so. In view of the Appellate Court's observation that the available facts are not complete, this Court felt mandated to order an evidentiary hearing in this cause. It therefore appointed counsel for Milton and scheduled a hearing.

At the hearing both sides represented to the Court that they had carefully investigated this matter and could unearth no facts not included in the State trial court record. The State admits the facts alleged by Milton, and relies solely on the law to sustain its position. Despite repeated questioning by the Court, counsel for Milton insisted that the record is factually complete. Therefore, the hearing in this Court consisted entirely of legal argument.

The factual basis for Milton's involuntariness claim is simple. He was indicted for the first degree murder of Minnie Lee Claybon, also known as Minnie Milton, and was incarcerated pending trial. Archie Langford, a police officer, was placed in the cell with Milton, who was told that

the officer was being held on investigation of a murder charge. The officer remained in the cell with Milton one night, the following day, and part of a second day. During that time Milton was not told of his cellmate's connection with the police force. Under instructions from his superiors, the officer questioned Milton as opportunities presented themselves in an effort to elicit from him evidence concerning the crime. The testimony of this police officer as to statements made to him by Milton during this period of joint incarceration comprises the oral confession which Milton charges was involuntary.

Milton argues that the oral confession was inadmissible because it was obtained by coercive methods and, therefore, involuntarily given. This allegation was exhaustively heard and determined adversely to Milton by the trial judge at his original trial. Under 28 U.S.C. § 2254 this determination is presumed correct. The opportunity afforded Milton at his trial to establish the alleged involuntary character of the confession comported fully with the most recent decisions outlining the requirements of due process.

In *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964), the United States Supreme Court emphasized:

> the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

The transcript of the record in this case establishes that the trial judge heard testimony out of the presence of the jury, including direct and cross examination of the State's witness and testimony by Milton, prior to finding that the oral confession was voluntary. This testimony and finding comprises twenty-eight pages of the transcribed record. This procedure afforded to Milton at his trial in 1958 was declared by the Supreme Court in *Jackson v. Denno, supra*, to be the desirable practice for the determination of admissibility of confessions by State Courts in cases subsequent to the 1964 *Denno* decision. Milton was given the benefit of such a prior determination in 1958. Nor did the effort to comply with all requirements of due process stop

at that point. When the jury was recalled, and Langford allowed to testify as to the oral confession, defense counsel was allowed to conduct an exhaustive cross examination comprising some thirty-five pages of the record. At the conclusion of closing arguments, the Court charged the jury that they should determine whether the confession was freely and voluntarily made by Milton and that if they did not determine the confession to be voluntary they should exclude such involuntary statement from their consideration of Milton's guilt or innocence, but even if voluntary it should be received and considered "with great caution," particularly if made after Milton was incarcerated and under arrest. The jury was further charged that in making their determination of the credence to be given to such confession all of the circumstances surrounding its utterance, including the motives which may have operated on Milton and including the harmony or inconsistency in itself or with other evidence in the case should be "fairly and fully" considered.

It is difficult to imagine how this trial judge could have been more zealous in his effort to follow acceptable procedure in making his determination that the confession was admissible as evidence of Milton's guilt and in charging the jury in a fashion most likely to give Milton every benefit of any reasonable doubt.

Not only did the trial judge follow acceptable procedure in making his determination of the voluntary character of the confession before admitting it into evidence but the record substantiates his finding. In *Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966), the Supreme Court spoke of the duty of a federal court in a collateral proceeding wherein the question whether a confession was involuntarily given is raised,

> to examine the entire record and make an independent determination of the ultimate issue of voluntariness.

The Supreme Court emphasized that although the requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966) that a defendant be advised of his right to counsel and given certain warnings at the outset of interrogation was de-

clared nonretroactive by *Johnson v. New Jersey*, 384 U.S. 719 (1966),

> this does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

It thus becomes the duty of this Court to determine what those standards of voluntariness were and whether they were met in this case. The test of admissibility of confessions as voluntary has been variously stated, but the requirement basically is that a confession must be the product of rational intellect and free will rather than being induced by conduct of state officials which might tend to overbear the defendant's will to resist, thus constituting coercion. *Townsend v. Sain*, 372 U.S. 293 (1963); *Lynumn v. State of Illinois*, 372 U.S. 528 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961).

Despite assiduous efforts by counsel appointed to represent Milton in this proceeding, this Court is simply not persuaded that Milton's confession was anything but "freely and voluntarily given" as those words were interpreted in 1958. Milton was a big, strapping heavyweight who bragged of his prowess as a boxer. He was twenty-three, young and strong. Although possessing only a sixth grade education, he could read and write. Langford didn't pressure him; in fact, the officer carefully refrained from seeming over anxious to secure information from Milton in the effort not to arouse suspicion concerning his motives. It is true that Milton was deceived by police officers into foolishly placing confidence in his cellmate. But this was his own folly. This case was tried six years before the Supreme Court indicated in *Messiah v. United States*, 377 U.S. 201 (1964), that confessions are involuntary *per se* if induced by officers or their agents from an accused after his indictment while he is without assistance of counsel. No Court has declared *Messiah* retroactive, and this Court will not be the first to do so. Counsel for Milton argues that *Messiah* was not declared retroactive because far from stating new principles of law, it merely restated principles

derived from *Powell v. Alabama*, 287 U.S. 45 (1932). However, the *Powell* case dealt with the Sixth Amendment right to appointment of counsel in a capital case, a situation far different from this case. Milton knew what he was doing. He wasn't intimidated by the police, because he didn't even know his cellmate was a policeman. He had a lawyer who had told him not to make any statements concerning his case, but he chose not to follow that advice.

There has been much new case law since 1958 dealing with the voluntariness of incriminating statements given by defendants. But the Dade County Police Department was confronted with a case in 1958 which it had to deal with as best it could under the law as it stood in 1958. The police would have been derelict in their duty had they failed to utilize every available means to discover the truth of the case. The crime was committed late at night, with no eye witnesses. Milton planned it that way and bragged to Langford that his was the perfect crime, without eye witnesses. The State sought its evidence as best it could. Disguising a policeman as a prisoner may not appeal to delicate senses, but neither does murder. And the deception practiced upon Milton was a time-tested tool of police investigation which, at least prior to *Messiah, supra* was acceptable to the Courts. *Young v. United States*, 107 F. 2d 489 (5 Cir. 1939).

Finally, it should be pointed out that even if the trial judge had excluded this oral confession, the jury would still have had the benefit of an earlier tape recorded confession by Milton, which was played twice at the trial, once out of the hearing of the jury, and subsequently in evidence. This confession was given several weeks prior to the oral confession in the jail cell. Milton was warned of his applicable Constitutional rights before he made the recorded confession. Although Milton argued at his trial that this earlier confession was also involuntary, he has not pressed that claim in this habeas corpus proceeding.

After a careful consideration of the facts of this claim and the applicable case law, this Court is led to the inescapable conclusion that Milton's confession was freely and voluntarily given. Thereupon, it is

ORDERED and ADJUDGED that this petition be and the same is hereby denied.

DONE and ORDERED at Miami, Florida, this 6 day of November, 1969.

/s/ Charles B. Fulton
Chief Judge

cc: MR. GEORGE WILLIAM MILTON
BRUCE E. LAZAR, ESQ. (*Atty. for Petitioner*)
JESSE J. MCCRARY, JR., ESQ., *Assistant Attorney General* (*Atty. for Respondent*)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GEORGE WILLIAM MILTON, *Petitioner,* vs. LOUIE L. WAINWRIGHT, Director Division of Correction, State of Florida, *Respondent.*	No. 69-705-Civ-CF ORDER

[Filed, Dec. 23, 11:55 A.M., '69, JOSEPH I. BOGART, *Clerk*]

The two-volume Circuit Court record transcript appended to this Order was delivered to this Court as an exhibit to the State's response to this habeas corpus petition. The case has now been resolved and a notice of appeal has been filed. In order that the record in the Court of Appeals may be complete, it is

ORDERED that the Clerk of this Court shall file this transcript with the records of this cause.

DONE and ORDERED at Miami, Florida, this 22 day of December, 1969.

/s/ Charles B. Fulton
Chief Judge

cc: DUBBIN, SCHIFF, BERKMAN & DUBBIN
JESSE J. MCCRARY, JR. ESQ., *Asst. Attry. Gen.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29064

Summary Calendar

GEORGE WILLIAM MILTON,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, *Director,*

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(June 23, 1970)

Before BELL, AINSWORTH and GODBOLD,

Circuit Judges.

PER CURIAM: George William Milton appeals pro se from the District Court's denial of his petition for a writ of habeas corpus. Milton is presently in the custody of the State of Florida under a sentence of life imprisonment. This sentence was imposed upon Milton's conviction in 1958 for the murder of his wife. We conclude that the

habeas corpus petition was rightly denied and, accordingly, affirm the judgment of the District Court.[1]

This is the second time that Milton has appealed to this Court from a denial of habeas corpus relief. Previously, we affirmed the denial on the ground that Milton had failed to exhaust available state remedies. *Milton v. Wainwright*, 5 Cir., 1968, 396 F. 2d 214. In accordance with our decision, Milton moved the state court that had sentenced him to vacate the judgment of conviction under Fla. R. Crim. P. 1.850. He was denied this relief without a hearing. Subsequently, the Florida Supreme Court denied leave to docket his habeas corpus petition on the ground that it was a successive similar petition. We agree with the District Court that Milton has exhausted the state remedies available to him and, therefore, consider the merits of Milton's claim.

In the court below, a lawyer was appointed to represent Milton, and an evidentiary hearing was scheduled on the merits of the petitioner's contention that his oral confession to a police agent disguised as a fellow prisoner had been involuntarily given. At the hearing, however, both petitioner and respondent agreed that further testimony was unnecessary and that the issues presented should be decided on the basis of the testimony adduced in the state trial court. After hearing argument from both sides, the District Court found that Milton's confession had not been obtained in violation of the federal constitutional standards applicable at the time of his trial and when his conviction became final. The District Court's opinion is reported. *Milton v. Wainwright*, S. D. Fla., 1969, 306 F. Supp. 929.

Having carefully reviewed the record, we conclude that the District Court's findings may not be set aside as clearly erroneous. The District Court has comprehensively dealt with the issues presented in this case, and we affirm on the basis of its opinion. We add, however, that the issue whether the rule of *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964), is applicable to Milton's confession

[1] We have concluded on the merits that this case is of the character that does not justify oral argument. Therefore, we have directed the Clerk to place the case on the Summary Calendar and to notify the parties of this action in writing. 5 Cir. R. 18.

is controlled by our decision in *Lyles v. Beto*, 5 Cir., 1966, 363 F. 2d 503, which refused to apply *Massiah* retroactively. *Accord*, United States *ex rel. Long v. Pate*, 7 Cir., 1969, 418 F. 2d 1028; United States *ex rel. Allison v. New Jersey*, 3 Cir., 1969, 418 F. 2d 332.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 29064

Summary Calendar

D. C. Docket No. Civ. 69-705-CF

GEORGE WILLIAM MILTON,
Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, *Director, Division of Corrections, State of Florida,*
Respondent-Appellee,

Appeal from the United States District Court for the Southern District of Florida.

Before BELL, AINSWORTH and GODBOLD, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: June 23, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29064

Summary Calendar

GEORGE WILLIAM MILTON,
Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, *Director,*
Division of Corrections, State of Florida,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(July 16, 1970)

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. SPRING TERM, 1958.

THE STATE OF FLORIDA vs. GEORGE WILLIAM MILTON, also known as GEORGE MILTON, *Defendant.*	Indictment for first degree murder

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of The State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 1st day of June, 1958, within the County of Dade, State of Florida, George William Milton, also known as George Milton, unlawfully and feloniously and from a premeditated design to effect the death of one Minnie Claybon, also known as Minnie Milton, did kill and murder the said Minnie Claybon, also known as Minnie Milton, by drowning her; that is to say, the said George William Milton, also known as George Milton, from a premeditated design to effect the death of the said Minnie Claybon, also known as Minnie Milton, drove or caused to be driven an automobile in which the said Minnie Claybon, also known as Minnie Milton, was then and there an occupant into a large body of water, to-wit: the Miami River, thereby causing the said Minnie Claybon, also known as Minnie Milton, to drown, a further and more particular description thereof being to the Grand Jurors unknown, contrary to the form of the statute in such cases made and provided, to the evil example of all others in like case offending and against the peace and dignity of The State of Florida.

/s/ Richard E. Gerstein
RICHARD E. GERSTEIN
State Attorney
11th Judicial Circuit of Florida

SPRING TERM, 1958 No. 1904-H

IN NO BOND

In The Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

CAPIAS ISSUED 7/2/58.

THE STATE OF FLORIDA

VS

GEORGE WILLIAM MILTON, also known as GEORGE MILTON,

Defendant.

ARRAIGNED 7/7/58

NOT GUILTY

INDICTMENT FOR FIRST DEGREE MURDER

A True Bill

JOHN J. PARTIN

Foreman of the Grand Jury

Filed and presented in Open Court in the presence of the Grand Jury this 1st day of July, 1958.

E. B. LEATHERMAN
Clerk, Circuit Court

By: WM. W. STOCKING
Deputy Clerk

[244] ARCHIE LANGFORD

was called as a witness on behalf of the State, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. BLOCK:

Q. Would you please state your full name?
A. Archie Langford, Jr.
Q. With whom are you connected?
A. The City of Miami Police Department.
Q. With what division are you now working?
A. I am now working with the narcotics bureau.
Q. Were you connected with the police department in July of this year?
[245] A. I was.

THE COURT: What bureau did you say?
THE WITNESS: I am now assigned to the City of Miami Narcotics Squad.

Q. (By Mr. Block) Were you with the Miami Police Department as of July of this year?
A. I was.
Q. Did you have occasion to see one George Milton in July of this year?
A. I did.
Q. Where did you see him?
A. The county jail.
Q. In what connection did you see him in the county jail?
A. I was placed in jail for investigation of murder, and I was also placed in the same cell with him.
Q. What name did you use?
A. Archie Lang.
Q. Who was in the cell when you were placed in the cell?
A. George Milton.
Q. Was there anyone else in the cell?
A. No, there wasn't.
Q. Do you remember what day this was that you were placed in the cell?
[246] A. The 18th of July.

Q. Approximately what time of day or night was it—was it in the morning, afternoon, or evening?

A. It was in the evening, approximately 7 or 8 o'clock.

Q. Did you have any conversation with George Milton that Friday night while you were in his cell?

A. No, I didn't. I just explained to him that I was in jail for investigation of murder.

Q. Did you offer him anything to talk to you?

A. No, I didn't.

Q. Did you tell him you were a police officer?

A. No, I didn't.

Q. What did you tell him you were in jail for?

A. For investigation of murder, for the killing of a Chinaman on 19th Street and 5th Court.

Q. What did he talk to you about? Did he talk to you about what he was in jail for that evening?

A. No, he didn't.

Q. Did you threaten him in any way?

A. I did not.

Q. Did you talk with him again the following day?

A. I did.

Q. Did you at that time threaten him in any way?

[247] A. I did not.

Q. Did you offer him any rewards or promises for talking to you?

A. I did not.

Q. Now, starting with the following day, which would have been July 19th, Archie, tell us as well as you can remember what your conversation with George Milton was.

MR. SANDSTROM: I object to it on the grounds that a proper predicate has not been laid.

THE COURT: In what respect?

MR. SANDSTROM: In the first place, it comes after the time that the purported incident occurred. In relation to the purported conversation or admission on any date, the corpus delicti has not been proved. There has not been a predicate laid to show the voluntariness of it or that he made a voluntary statement, and that there was no influence brought to bear upon him.

I would like that predicate laid in the absence of the jury.

THE COURT: Take the jury out.

(Thereupon the jury retired from the courtroom, and the following proceedings were had:)

THE COURT: Further qualify him.

Q. (By Mr. Block) Archie, during the time that [248] you were in the cell with George Milton, was he at any time threatened?

A. He was not.

Q. Was he abused in any way?

MR. SANDSTROM: I object. This isn't telling us what occurred.

THE COURT: Just ask him what he knows. Just tell us what you did.

THE WITNESS: I was placed in the cell on July 18th, approximately 7 or 8 o'clock. I was fingerprinted and mugged and carried directly to the cell. Approximately 30 minutes after I was in the cell, one of the jailers came to me and carried me outside of the cell and asked me what was my reason for being in jail.

I explained to him, also, that I was involved in the killing of a Chinaman on 19th Street and 5th Court.

Q. (By Mr. Block) Did the jailer know why you were in jail, actually, if you know?

A. He did not know.

Q. Okay.

A. He then carried me around to the side of the wall and questioned me in reference to why I was placed in a special isolation cell. I did not know, but I was being investigated for murder. He asked me if I felt bad, and I said no.

[249] Q. Did they question you why you were put in the cell with Milton?

A. They just put me there, I guess. I looked, but he didn't have a badge, he didn't wear his badge. He then placed me in the cell and I began to talk to Milton. "I wish I was out in the street." He didn't say anything the first night. He just talked about "What's your name, where do you live at."

The next morning, breakfast, we had oatmeal. I offered him may oatmeal. I can't recall whether he ate it or not. We began to talk about the crime that I was supposed to have committed. I explained thoroughly the plan that I had in reference to the crime. I was trying to convince him

I had committed it and we began discussing it. He then told me, he asked—he asked me did I have a lawyer. I told him, "Yes, I got a lawyer—Arrington."

He asked me how did they find the gun. I explained that to him. He said, "Remember, if you go down for investigation, don't take the truth serum test." I said, "Truth serum, what's that?" He said, "You don't know? Just remember, don't take it."

Well, I told him that I had volunteered to take the truth serum. He said, "Wait a minute. I took the truth serum test and I made statements; but my lawyer told me to change the statements and to tell the Court, the Judge, [250] that they made me make those statements by force."

So I said, "Well, I promised I was going to make the statement."

"You don't have to make the statements. Don't tell anyone I told you. You don't have to make the statements." I said, "Okay."

So we talked a few minutes and he said, "You kill a white man. They are going to burn you." So it was a joke about me killing a white man.

Later on during the evening, I tried to get him to discuss what he had done. He just said, mumbled a few words, and cut it short. At approximately 4 o'clock that evening, just before dark, he began to tell me. I asked him in reference to the incident, what happened with him.

He said that they had him in jail for investigation of killing his wife. So I tried to get him to explain to me what happened. He said he didn't want to talk about it. So a few minutes later I began to sit up. I told him, I said, "They told me last night you was crazy." He said, "I'm not crazy."

I said, "The reason they put me in here was they told me you were crazy and that during the night you would beat me up to death, something like that."

"I am not crazy." So he began to explain and tried to prove to me that he wasn't crazy. I said, "What [251] do they have you in here for?" He said, "They have me in here for killing my wife." So I said, "Did you kill her?" He said, "No."

"Well, I heard you raped her." He said, "I didn't rape her." So I tried to convince him that I was under the

impression that he had raped her. He said, "I didn't rape her."

So, at that point he began to explain to me that she was pregnant at the time. Then he said to me, "I don't want to discuss it any more." I said, "Okay," so I laid down on his bunk.

As night fell, I think it was on Saturday night, the second night, and from the cell you can see the Harlem Square Bar. There is a sign that runs around the bar. I told him, I say, "They are having a dance down there tonight. I wish I could go to the Palms."

We began to discuss it. We then went to the subject of murder, which he was supposed to have committed. He then told me, he say, "Sit down, I want to tell you something." So he began talking. He said, "You killed a white man. I killed a colored person." He said, "They are going to burn you, but they don't care how many Negroes you kill."

I said, "My lawyer said we can beat it." He said, "You can't beat it because those Chinamen have a Chinese [252] Committee. They will pay to have something done to you." I laughed. I said, "You haven't heard of Arrington, have you? Let me tell you about a case that Arrington had."

I begin to give him a long story about Arrington and to convince him I was under investigation.

"I will get out." He said, "I hope you get out, but I'll tell you one thing: If you get out on bond, you leave town." So I said, "Why you say that—if I get out on bond that I should leave town?"

He said, "If I get out on bond, I am going to leave town." So I said, "Well, you say you didn't do anything. Why should you leave town?" He said, "The way things are now, it looks bad." So we begin discussing how long he had been in jail.

I then tried to bring him back to the point of events, what happened. He said to me, "If you leave town, they will probably be looking for you. What you should do is go out West or somewhere. If I leave town I am going up North."

"Man, they'll find you up there."

"They won't find me. I know a couple of places. I am going out in some town where there is mining work or working in the wood pulp, somewhere in the fields." I went

along with him that that was probably right. So I said, "If I get out of jail, if there is someone you want me [253] contact, you tell me."

"You're not going."

"I bet Arrington can get me out. He is known to get a person out on bond."

He said, "No. My lawyer told me not to contact anyone. I am not to give anyone information." He said, "The only thing I have to give is my name, address and age. He said don't give any more information."

I asked about the statements he said. He said, "My lawyer told me to tell them that when I went down to the investigation, that I was forced to sign those statements, that I didn't have enough education, and that I signed on the dotted line, and then they added statements to it."

I said, "Well, that might hold up. That's a good case." So we begin to talk. He told me, he said, "Do you like movies?" I said, "Yes."

"Did you see the picture 'Sweet Fragrance of Success'?" I said, "No."

"That's the picture you should have seen." I said, "Why?" He said, "That picture was about a perfect crime." I said, "Perfect crime? There is no such thing as a perfect crime. There is somebody going to know about it."

I said, "I almost committed a perfect crime, but my partner left a gun in the trunk of a car. They found the gun." So he said, "That's the thing I got against you [254] all. When you do something, you supposed to do it by yourself. You don't have anybody on it. I committed a perfect crime because I was the only one that know exactly what happened. I am the only witness."

He said, "My lawyer told me everything was going to be okay when I get out of jail. I left a lot of money."

"Where you going to get money from?" He said, "My wife has insurance." I said, "You are not going to get any money. That was accidental." He said, "When you take a policy out on a person——" I says, "Take out a policy!" He says, "I don't want to talk about it any more."

So he laid up on his bunk.

So I begin to try to get him to tell me what happened. So I started talking about water, drowning. He told me talking

about water and drowning hurts his head. So we finally beat around the bush. It was one or two o'clock at night and we was talking and he begin to tell me that he had took out a policy on this female, and that he made a check by someone and that they told him the policy he took out wasn't any good because it was a straight life. He had to take out an accidental policy to collect this amount of money. So he said that later on he took out a policy.

Then we started discussing about cowboy pictures. He knows quite a bit of movies. He said that he [255] enjoyed cowboy movies, that's what he does on his time off is go to the theater. We started discussing cowboys and different movies where perfect crimes were almost committed. And he kept stressing to me that he had committed the perfect crime.

So I was discussing a movie where a cowboy almost committed a perfect crime. Someone blundered the deal up and that is the reason—he said, "That's the reason I told you that whenever you do something, do it by yourself. I will be out of here in a couple of months. My lawyer told me that."

He said, "My lawyer told me don't sign anything, don't talk to anyone, just give your name and address and that's all I have to do." And he said, "When the deal go on, I will have a large sum of money."

I said, "Large sum of money?" He said, "Yes." So I said, "You mean from the insurance?" He said, "Yes, I am going to buy a lot of nice clothes."

He started telling me that he was a boxer and was going back and start a boxing career. After that we talked and discussed boxing. I never did any boxing but I played football. He didn't know too much about football. So we went from that subject and we just started different things that happened in the outside world.

Then we started talking a little while later. [256] I went into the full details, telling how the crime I was supposed to have committed was done. Then he broke down. He started telling me how he knew he committed the perfect crime. I tried to explain to him that there was no such thing as a perfect crime.

After I finally convinced him there was no such thing as a perfect crime, he began to tell me his story. He said that

this night he had a car. I thing he had the car for about a week or two weeks, but anyway he expressed that the car had been bought.

He had his wife go somewhere with him, up to Hallandale, if I am not mistaken. Anyway, on the way back, they came around an area, Highway No. 27.

"Why did you come that way?" So he didn't say any more about that, because it looked like I was pushing him too fast. So I carried him back.

"What was up at the Palms that night?" He said he told me that a Negro band was up at the Palms. He begin to tell me that he came around Highway 27 again. He also said he met someone, but he never tell me who he met. So he said he brought the girl directly—no, he say he was trying to make up his mind what he was going to do. There was a lot of traffic in the street, and he went home, 5th Avenue, and parked the car. She had drunk some beer and was sleeping. So he told me that he went home and parked the [257] car in front of his door, and he went in and done something.

He went inside to carry his wallet and her wallet, one of them he carried inside the house and came back out and told her to get in the back seat. He then said he drove down to 5th Street around in the area of 3rd Avenue. Anyway, he wound up saying he was down by the river. His first intention was to go into the water and get out. He changed his mind as the car was rolling; he jumped out then and he said some white people came back and tried to assist him after it was over, after the car had gone into the river.

"Why didn't you go into the car?" He said, because he didn't want to go in the car. I asked what did he have to do when he went home. He said he carried her belongings home and kept the driver's license. He said, "Just in case the police got me, I could identify myself."

"You had a plan of killing her?" He laughed and said, "I told you I had committed a perfect crime." So I played along with him. I gave him some candy. When I went in the jail, I carried six ten-cent candy bars, and I gave him one of the candy bars.

Every time I went out of the cell, he would steal one and eat it. Knowing he was stealing them, I wouldn't say anything, because I wanted to work right along with him.

So later the next morning, which was Sunday, [258] we

began discussing—I told him I had been in jail for 72 hours and it was time for Arrington to do something. He told me that if I get out, to make sure that I left town.

I said, "I'm not going to leave town because I think I can beat it." "Remember, you killed a white man, I only killed a Negro, and you know that when you kill a white man you going to get some time or burn."

"I don't think so. I didn't pull the trigger, I wasn't in possession of the gun." He said, "If I get out I'm going to leave town. I am going to clear the city." I said, "Is there anyone outside you want me to contact when I get out?" He said, "No, my lawyer told me not to contact anyone. He would contact me."

I said, "Well, okay." So we began to discuss a few movies and I tried to make him tell me what the movie, 'Sweet Fragrance of Success,' if there was a perfect crime in the movie.

Then afterwards, later on in the day, I was contacted by my superior officers and removed from the cell.

MR. BLOCK: May I inquire as to certain things up until this point, ask him certain questions? I believe the witness has forgotten something.

THE COURT: All right.

Q. (By Mr. Block) Did he at any time tell you why he had killed her?

[259] A. He said before——

MR. SANDSTROM: I object to this. This is leading and suggestive and hasn't got anything to do——

Q. (By Mr. Block) The answer is yes or no. Answer it.

THE COURT: It is out of the presence of the jury. I am not able to determine whether it should be in the presence of the jury or not.

Q. (By Mr. Block) Did he tell you that he had killed her?

A. Yes.

Q. What did he say?

A. He said he had been here in Miami quite a while and things were kind of tough for him, and he had been working. He told me he had been working on Miami Beach as a bell boy or some job. He was in need of money, said he had contacted someone's mother or father, or someone. They told him, "You are old enough to make money of your own."

He said that's how him and someone else schemed to get this young lady's insurance.

After he found out he had the wrong insurance he had to change the policy and get one that was accidental.

Q. Did he at any time tell you if he did anything to his car?

A. We started talking together, whether he had [260] raped a young lady or not. He didn't want me to be under the impression that he was a rape artist, so he began to explain to me that she was pregnant and that was the reason she was in the back of the car without any pants on.

So I said, "Gee, I heard about they told you raped that girl."

"I didn't rape that girl. She was my wife, she was about three or four months pregnant, something like that." There was something on the back of the car. I don't know what kind of a latch. He knew the name of it. It was on the door and you couldn't open it from the inside, some kind of a safety latch that you use when you drive with children in the car. That's when I asked him how long he had the car. He said he had it approximately one week. He gave me the correct day. It wasn't much more than a week or two weeks.

Q. Did he say anything about any locks on the car, on the outside of the car?

A. He said that on the car door was some kind of system where when you drive with kids in the back of the car they usually place it around in there. There is a lock there that you can only unlock from the outside. And he said about her being in the back seat was the reason she couldn't get out.

Q. Did he tell you if he had done anything to the [261] door?

A. Well, he explained to me first that he knew that the door was locked, and they had it fixed. There was a special reason for putting her in the back—so she couldn't get out.

Q. When were you released from the cell?

A. That Sunday following.

Q. About two days later?

A. About two days later.

Q. Did you at any time lay a hand on the defendant, threaten him in any way?

A. No, I didn't.

MR. BLOCK: Would you like to examine?

CROSS EXAMINATION

By MR. SANDSTROM:

Q. What time were you first put into this cell?

A. I was put in the cell July 18th, around 7 or 8 o'clock.

Q. You didn't talk about the case that night?

A. I tried to hint around to him, but he was kind of pushed. He wanted to talk about other things first, so I didn't put the pressure on him at all.

Q. Answer my question, please. The answer to my question is no?

A. No, I didn't talk about the case at all.

[262] Q. When did you first get around to talking about the case?

A. That moring.

Q. And how many times had you endeavored to talk with him about his case?

A. Two or three times.

Q. Two or three times before he started talking about his case at all?

A. Right.

Q. Did he tell you he was represented by a lawyer?

A. Right.

Q. He also said that the lawyer told him not to talk to anybody else?

A. Not to talk about any investigation.

Q. He said not to talk to anybody in the cell?

A. Right.

Q. In spite of that, he told you all of this story?

A. After I convinced him I was in jail for murder.

Q. After he told you that his attorney had told him not to talk with anybody in his cell about his case, then he told you this anyway?

A. No, he just didn't come right out and tell me.

[263] Q. All right. Now, did he tell you what kind of a car he had?

A. No, he didn't tell me.

THE COURT: You are going into what he was told. I think you are challenging his testimony. It is all on the

grounds of voluntariness. I would like for you to confine yourself to that.

Q. (By Mr. Sandstrom) You never told him you were a police officer?

A. I was told not to advise him of that.

Q. You particularly got arranged to get in, or someone in charge of the department arranged for you to be put in his cell?

A. Right.

Q. You remainded with him over 24 hours before he started telling you about his case?

A. Approximately 12 to 18 hours.

Q. And then he didn't tell you anything about the case until that evening or the next day?

A. Next morning.

Q. The next morning after that?

A. Yes.

Q. Now, how many time did you endeavor to talk with him during that time?

A. Maybe two or three times.

[264] Q. He didn't have any choice about getting you out of the cell?

MR. BLOCK: That is improper.

MR. SANDSTROM: I think it is a matter to be considered on the predicate.

MR. BLOCK: It is improper.

THE COURT: I think it is obvious, but I will let him answer the question.

THE WITNESS: Would you mind reading that back?

THE COURT: He couldn't put you out of the cell if he wanted to?

THE WITNESS: To my knowledge, no.

Q. (By Mr. Sandstrom) Every time he stopped talking about his case, you kind of began talking about it again, didn't you?

A. No.

Q. How late in the night did you keep talking to him about this case?

A. One or two.

Q. One or two?

A. Yes.

Q. Each time he would stop talking, you would start talking about it again?

A. No, we would go over into different subjects and come right back to it.

[265] Q. Didn't you say you had started talking about his case again?

A. After we talked on other subjects, to keep the conversation going.

Q. You kept bringing him back to the same thing?

A. Right. It lasted until 3 o'clock in the morning, something like that.

Q. Now, how long did you actually talk with him, or so to say, question him, about this case before he started telling you anything about it? Not in time lapse, now, but in the time element of talking?

MR. BLOCK: I don't understand the question.

THE COURT: I don't think we understand it. I wish you would rephrase it.

Q. (By Mr. Sandstrom) Now, how long after you had been put into the cell, how long had you talked to him and questioned him about this before he started telling you anything about this case?

MR. BLOCK: I don't feel the witness understands.

THE COURT: Do you understand the question?

THE WITNESS: I still don't actually know what he means.

THE COURT: If you can answer him, answer him. If you don't know, just tell me.

THE WITNESS: I was placed in the cell Friday at [266] approximately 7 or 8 o'clock. He and I discussed the reason why I was in jail, and other things until the next morning, until after breakfast, which was about 11 or 12 o'clock.

Q. (By Mr. Sandstrom) When was the last time you questioned him about this case?

A. I was not questioning him.

Q. You were asking him questions about it, weren't you?

MR. BLOCK: He testified he was talking to the witness. He didn't say he was questioning him.

MR. SANDSTROM: It is still a matter of questioning.

MR. BLOCK: There is a difference between talking and questioning.

THE COURT: I will let him answer it.

Q. (By Mr. Sandstrom) When was the last time you questioned him about it?

THE COURT: He said that several times he brought the subject back to this situation. I assume that was asking him, asking him a question that would be as to what was said.

THE WITNESS: I understand it.

THE COURT: I think he has already testified that he talked to—questioned him two or three times, I believe he said.

MR. SANDSTROM: For a period of two or three days.

[267] Q. (By Mr. Sandstrom) Now, prior to the time that you commenced questioning him, had you read any kind of a statement he purportedly gave?

A. No.

Q. Had somebody told you about the case that was purportedly against him?

A. No.

Q. Nobody had told you anything?

A. They didn't.

Q. Now, had they told you the name of the person you were to talk to before you were put in the cell?

A. Yes.

Q. Did they tell you what you were to talk to him about?

A. They told me that I was supposed to try and seek information without using any kind of force or promises.

Q. You were put in purposely to lie about who you were?

MR. BLOCK: I object to that. That is improper.

THE COURT: I will sustain it.

Q. (By Mr. Sandstrom) You were put in there with instructions to conceal your identity?

A. Right.

Q. And you were also put in there with instructions to keep talking to him until you got him talking about this [268] case; is that right? That is apparently what you did, isn't it?

A. We talked with each other. Sometimes he woke me up during the night to talk.

Q. How many times did you wake him up during the time?

A. I was sleeping on top of him. He would start talking and I would lead him into the subject.

Q. How many times did you awaken him?

A. I will say about once or twice.

Q. Once or twice you woke him up, even in the night to talk to him. How long had he been asleep by the time you woke him up?

A. He was easy to wake up. He was sensitive.

MR. SANDSTROM: I believe that is all I want to inquire of him.

I would like to put the defendant on with regard to this.

THE COURT: You may do so.

Thereupon——

GEORGE MILTON,

the Defendant herein, was called on his own behalf, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. SANDSTROM:

Q. State your name.

[269] A. George Milton.

Q. And how old are you, George?

A. Twenty-three years old.

Q. And how many times have you been incarcerated; that is, put in jail?

A. You mean the times I were put in jail?

Q. Yes.

A. You mean the time I was arrested?

Q. Exclude this case for a moment; except for this case, how many times have you been in jail before?

A. I was never in jail before.

Q. With regard to this case, that was the only time you had been in jail?

A. That was the only time I was in jail, the only time I ever been incarcerated by the police whatsoever.

Q. Now, George, calling your attention to that Archie Langford that was just on the stand, did you recognize him?

A. I recognized him.

Q. Did you ever have occasion to be in the same cell with him?

A. I were in the same cell with Archie Langford.

Q. Tell us what occurred from the time he was put in that cell until the time he left that cell.

A. Well, when he first came into the cell, well, [270] just like any other prisoner—I was in jail for five months and twenty-six days, so sometime different fellows come in and leave. He came into the cell. He just came in the cell as far as any——We had conversations about mostly—about the different things. The time he was there, well, if I remember correctly, which I am sure I do, he was taken out of the cell one night about roughly, well, maybe three or four times—I don't remember.

When he came back to the cell, then he said, "I just came back from talking to my attorney and I was talking to another detective downstairs. He is the kind of fellow—I think Detective Shepherd was his name. Do you know him, Milton?"

I said, "What was the name again?" He said, "Detective Shepherd."

"I remember Detective Shepherd. He is the man that is in charge of my case." He said, "Detective Shepherd said that you drowned your wife and how about that?" I said, "That's not true whatsoever."

He says, "Well, now come on, what about it?" I said, "It's not true whatsoever, and I have already been embarrassed enough by the newspapers and the scandal of my name. I don't want to talk about it whatsoever. I am already sick about it, the way it is. The whole thing is just something that was automatically just brought up from no reason whatever [271] and I just wouldn't even talk about it."

And as I offering my sworn testimony to this Court, that was the only words that was exchanged between Archie Langford and I. We never said anything else about anything, and we never had any other conversations as far as I were concerned.

As soon as I told the way I was feeling, that my name was a scandal in the newspapers about I murdered my wife and my baby and all, and collect some insurance, it was just terrible. After that, I told that it was a sin the

way people can make something when nothing was actually there. After that we never talked about anything any more.

I think the next day or so, Archie Lang left. But as far as any other conversations whatsoever, that was not true, and that is my sworn testimony.

Q. Did you ever talk to him about the facts of your case?

A. I never mentioned anything except he only mentioned it once, to be honest and truthful. He only mentioned it once; just one time.

Q. Did he ever mention, "What are you in jail for?"

A. I said, "Well, it is bad enough as it is. I don't want to talk about it. That was the only time he even mentioned it. After that——

[272] Q. Prior to the 18th day of July, had you ever spoken to me before; that is, before July 18th?

A. You mean before on July 18th?

Q. Yes, before the 18th day of July.

A. Before the 18th of July, well, if I remember correctly, after being in jail for 19 days, I was finally admitted to try and call someone to take over my case—after 19 days. Otherwise, before then I was not even allowed to call my family or my wife's family.

MR. KOGEN: I have a motion to strike that testimony.

THE COURT: There is no jury in here.

Q. (By Mr. Sandstrom) What day did you first talk to me, do you recall?

A. Well, if I remember correctly, I believe it was—I believe it was on the 19th, I believe.

Q. Of what month?

A. I believe it was the 19th of June.

Q. Now, were you advised with regard to making any statements to anybody in the same cell about your case?

A. I was never advised or anything. I just always—I never was advised or told to do or not to do.

THE COURT: Were you advised about talking to people, something of that sort?

Q. (By Mr. Sandstrom) Did I ever mention to you about talking to people in the cell with you about your case?

[273] A. That is not—you never did.

Q. I never told you to talk to him. Did I ever tell you not to talk to him?

MR. BLOCK: He's got an answer that he obviously is trying to straighten out.

THE COURT: Let him answer it.

THE WITNESS: What was the question again?

THE COURT: Did he talk to you, tell you to talk to him or not to talk to anybody in the cell. He said he didn't tell you not to talk to anybody, was his last question.

MR. SANDSTROM: About the facts of your case.

THE COURT: Did he answer that yes or no?

THE WITNESS: Did he tell me not to talk to anybody? I can't remember him making a statement one way or the other, but I never talked with anybody. I can't remember him telling me, advising me. As a matter of fact, I can say he never advised not to talk to a police officer or anything like that.

Q. (By Mr. Sandstrom) Now, do you remember how long this Archie Langford was in the same cell as you?

A. Well, a day or so; maybe a day, maybe two days, something like that.

Q. During that course of time, did he ever wake you up in the night time to talk to you?

[274] A. No, we never talked at night whatsoever. Matter of fact, I always be just setting down thinking, I mean, we never even talked too much, to be honest and truthful about it. We never talked too much about anything and he only mentioned it once, about my case. I just told him just like it were. I was feeling bad enough.

THE COURT: You already told us that. Let's don't go into repetitious matters. Do you have anything further to ask of him?

MR. SANDSTROM: No.

THE COURT: Let me ask him.

Did this man ever tell you he was a police officer?

THE WITNESS: No, he never said anything that he was a police officer.

THE COURT: Did he ever threaten you in any manner while he was in there?

THE WITNESS: No.

THE COURT: Did he ever promise you anything?

THE WITNESS: We never talked.

THE COURT: Did he promise you anything if you would

do any talking, regardless of whether you said anything or not?

THE WITNESS: He didn't make any promise to me whatsoever.

[275] THE COURT: Anything further?

MR. SANDSTROM: No.

[276] Thereupon—

ARCHIE LANGFORD, JR.,

was recalled as a witness on behalf of the State, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By MR. BLOCK:

Q. Archie, I believe before the jury retired, you were telling us that you were placed in the cell with George Milton on Friday evening, July 18th, is that correct?

A. That's correct.

Q. Approximately what time was it that you were placed in the cell?

A. Approximately 7 or 8 o'clock on July 18th.

Q. Who was in the cell?

A. George Milton.

Q. Anyone else?

A. No one else.

Q. Did you tell George you were a police officer?

A. I did not.

Q. What did you tell him?

A. I told him I was placed in the jail for investigation of a murder of a Chinaman on 19th Street and 5th Court.

Q. Did you talk to him that evening?

[277] A. I explained to him the reason I was in jail, but I didn't talk to him about this case at all.

Q. Did he discuss this case with you that evening?

A. He did not.

Q. When did you next speak to him?

A. I woke up the next morning as they were serving breakfast. I heard him sliding the trays around in the hall, which was approximately—right now, I couldn't tell you at all.

Q. Archie, start from there and tell us as well as you can

remember, your conversations with the defendant, George Milton, from that time until you were released from the cell.

MR. SANDSTROM: Comes now the defendant and objects to any testimony about any conversations had in the cell on the grounds, first, that there has been no proof of the corpus delicti and, therefore, this statement, at this time would be in the nature of an admission or confession, without the corpus delicti having been proved prima facie exclusive.

Secondly, upon the grounds that there is no proper predicate laid for the admission of the same in that the same was obtained by subterfuge. As for those other grounds and matters which the jury didn't hear, further upon the grounds that the same isn't shown to be a voluntary [278] statement, that it was pried from him through prolonged questioning of him by this witness while being in the cell.

THE COURT: All motions will be denied and the Court will say now that your objections go to any questions that are asked and any answers that are made as to the statements that he is going to testify about, without renewing your objections. And if at the end of the testimony, you desire to do so, you move to strike it.

MR. SANDSTROM: Surely the same ruling will apply.

THE COURT: I am just trying to preserve every one of your rights.

Mr. Block, you may proceed.

THE WITNESS: On the Saturday, July 19th, he and I began to discuss, while we was eating breakfast—we had oatmeal for breakfast. I gave him my share of the oatmeal. I began to eat one of the candy bars. I then began to tell him that I was glad when my attorney, Arrington, would bond me out. He then say, "How will you get an attorney?"

"I have got numerous dealings. I have some money saved and I've got a girl in the street that will take care of all of that business for me."

We talked about my attorney, Arrington, how good an attorney he was and such, and the number of deals he had pulled in the area for five fellows. I said, "When I get out, everything will be all right. I don't kill the [279] man; I had the gun in my car."

He told me, he said, "If you get out of jail on bond, you've got to leave town." I said, "Why, I haven't done anything. The only thing I done was it was my gun." I explained to him that I was not actually involved in the shooting, that I had just taken part in the robbery and that my friend had done the actual killing, and that I had the gun concealed in my vehicle. So he said, "If you get out of jail and on a bond or anything, it will be best for you to leave town."

I said, "Why?" He said, "Better if you get out of jail you leave town. Go somewhere, out West or up in Chicago, somewhere." I said, "Why?"

"Listen, you kill a white man."

"But I didn't do it, my friends did it." He say, "Listen, you killed a white man, I killed a colored person." He said, "They don't investigate too many killings of Negroes. If you kill a white man, a Chinese, the Chinese committee, they have got a lot of money. They are going to do something to you."

He said, "Since you killed a Chinaman, the Chinese committee will have something to do." I said, "I haven't done anything to the Chinaman, the other fellow did the shooting. I just had the pistol."

"You know they are going to do something to [280] you for killing the white man." I said, "No, we got a good attorney."

"If I get out, I am going to leave town." He also talked about a little town where they had wood pulp. You can go out to the woods and stay there without anybody following you or anybody know who you are. I said that I couldn't do that.

Q. (By Mr. Block) Did he tell you what happened to people who kill colored people?

A. He told me.

Q. What did he say?

A. He said, "If you kill a white man, you get the chair, somebody kill you. But you can kill all the Negroes, they wouldn't even investigate it."

So I laughed and we begin to talk further on. So I said, "Well, what are you in for?" He said, "I told you I was in for investigation of murder." I said, "Investigation

of murder? Who did you kill?" He said, "I killed my wife."

I said, "Yes." We begin to talk. "They told me you were crazy, too." He said, "I am not crazy." So I says, "What happened? I heard about it. I heard you raped that girl." He said, "I didn't rape the girl." I say, "Why didn't she have clothes on? She didn't have clothes on." "She had a skirt and blouse." I said, "They told me she [281] didn't have any pants on." He said, "She was pregnant, she didn't wear any pants."

I said, "Yes." So I began to talk about water. He said that talking about water makes his head hurt, so I said okay. He changed the conversation and went over to talking about some movies. After a while we began talking about——

Mr. Sandstrom: When he refers to "after a while," I think the predicate as to the time should be laid.

The Court: Try to give us the time.

The Witness: They vary five to ten minutes because I knew I didn't have too much time in the cell with him. I would go directly back into the same thing again. The conversations varied for about five or ten minutes, and I knew that I didn't have too much time in the cell with him. I was trying to keep him as close to the subject as possible.

So approximately 10 minutes after we discussed this business about the water, we began to talk about a movie which he seen, by the name of "Sweet Fragrance of Success." He told me this movie had a perfect crime, it was about a perfect crime that had been committed. I told him that I didn't believe there was such a thing as a perfect crime.

He told me there was such a thing as a perfect crime. So we began to discuss my case. He tried to show me points where we could have committed that crime without even [282] finding the gun in my car. I told him it wasn't mine. I told him how it was concealed and who put it in—that it was concealed in the spare tire. He said that wasn't good.

I said, "What about you? You are in jail." He told me he committed a perfect crime.

Q. What did he say?

A. He committed a perfect crime. So he started talking

about this "Sweet Fragrance of Success," about how in this movie there had been a perfect crime committed.

"I don't believe in perfect crimes." He said, "Yes. You didn't commit one because you are going to burn, too."

Then we started discussing about the guys in the next cell, this fellow was to be shipped back to Alabama. So we started discussing and this fellow said that Milton and I was going to burn. So Milton said, "I am not going to burn." That carried on for maybe 10 or 15 minutes. Approximately five or ten minutes later, I considered the guy in the next cell about telling him something that he was crazy. Milton told me to do it, to do that.

Q. In discussing this business about a perfect crime, did he tell you he had committed a perfect crime?

MR. SANDSTROM: I object to that. That is leading and suggestive.

THE COURT: That's leading. He testified about [283] something in that regard.

Q. (By Mr. Block) Did he tell you how or why he had committed a perfect crime?

MR. SANDSTROM: I object to it on the same grounds, leading and suggestive.

THE COURT: Don't lead him.

Q. (By Mr. Block) Did he say anything further in connection with a perfect crime?

A. He did.

Q. What did he say?

A. He told me that he committed a perfect crime because he was the only witness, that the other person involved was dead. So I said, "Well, did some people ever see it?" He said, "No one saw it, but I'm the only one that knows."

I said, "Well, what do you plan on doing?" "If I get out on bond, I am going to leave town. My lawyer told me not to try it, to get out on bond right now, because it take up some of the money." He said, "My lawyer also told me the statements, conversations I gave to the City policemen, to say that I didn't make them." He also told me that they made a recording of some kind of a conversation, that his lawyer said they couldn't use it.

He said, "My lawyer told me that every statement I signed, to say they added some words or statements to

[284] it, that I hadn't had much education and schooling, that I was forced to do so.'" He said, "My lawyer told me don't contact him, that he would contact me." So I said, "When I get outside, maybe I can do something for you." I tried to get him to explain exactly what happened.

He said, "Don't talk about it." He didn't want to talk about it. He laid up on his bunk for about 15 minutes. I was looking out of the cell.

That night I was looking out of the cell, I was watching the Harlem Square lights. I said, "There is a dance down there at the Harlem Square."

Q. Where is the Harlem Square?

A. At 10th Street and Northwest 2nd Avenue.

Q. Could you see it from the jail?

A. You can see approximately 15 to 20 feet of the building downward. From the cell you can also see the neon lights, as the neon arrow runs around the building. I also was pointing out the different clubs.

"Man, I remember the night, a few nights ago, I was up to the Palms." He started talking.

"That show was great." We talked about that, and then I went back to the subject with him. He then told me if I had ever been to the Palms. I told him that I had been to the Palms.

"What night were you there?"

[285] "I was there a couple of times with different people." So I said, "Are you a rape artist or not?" He said, "I am not." I said, "The reason they put me in here is they told me you was crazy."

"I am not crazy." He told me, he say, ("I will show you something when I get outside. I am going to have a lot of money." He said, "I am going to take up boxing. I was training to be a boxer." And he he get out, he was going to get back and start boxing. With this money he was going to buy all the boxing equipment. He was going to be another champion, another Joe Louis.

"I don't know too much about boxing, myself." He said, "You can be a boxer." He sized my shoulders up and everything.

"No, sir, I like to play football. Where are you going to get the money?"

"From the insurance money. They is going to pay off the money.

"How is the insurance company going to give you money, you're in jail, man?" He said, "My wife was insured." I said, "Well, you are going to burn." He say, "I committed—I told you once that I committed a perfect crime." I said, "You committed a perfect crime? There is no such thing as a perfect crime." I said, "The best you can do is buy off somebody and win the case in court by paying [286] somebody."

"My lawyer got everything worked out. My lawyer know what to say and what not to say, and what to do when I go into the court."

"When you go down to take the truth serum, you want to just refuse to take it. They can't give it to you."

"How are you going to refuse?" He said, "My lawyer told me I didn't have to take it. I don't have to say anything, that he probably would win the case for me."

I said, "I told the detective with the City that I wasn't going to give the statement because I wasn't involved in the murder. I was just with the fellow when the deal happened." He said, "Just remember, don't you take the truth serum."

"What's the truth serum?" He said, "Is all they gave you a shot into your arm, or something. You lay down on the couch and you talk out of your head."

"Were you out of your head?"

"No, I was not out of my head. I knew what was going on."

"What did you tell him?"

"I told him what happened. I'm glad I got it off my chest but my lawyer told me to say I didn't say that, that I didn't sign any statements." So I said, "Yes."

It began to get later at night and I say, "How [287] did the woman actually get killed if you didn't rape her?" He said, "I had a car." He never told me what kind of a car it was. He said he had a car, and he had been up in the area of The Palms. Whether he went to the Palms or not, he didn't explain.

He was up in the area of Hallandale. He came back to Miami by way of Highway 27. I said, "How come you didn't come down U.S. 9? That's the way we used to go when I was a teenager."

"I came around that way." I said, "For what?"

"Well, just driving." I said, "Man, if you don't know

Miami good enough, to go all the way to U.S. 27, that's the roundabout way." So he said that was okay. He sit down on his bunk. So I said, "Well, one thing, when you get out of here, you are going to burn."

"Let me tell you something. You get your lawyer to get you out of here and you leave town."

"What are you going to do?" He said, "If I get out, I am going to leave town." So I said "Okay." So I sat down on the bunk for about 20 minutes, and then I began talking about—I love fishing and different things.

So then we went to the subject of him driving the car down U.S. 27. So he told me I was a fool for being in the deal with another fellow that was a rat. I told him that I thought the fellow was a thoroughbred. I told him I [289] wasn't in the deal, and that I thought he was a man.

"Whatever you do, when you do something, do it by yourself." He said, "I can take you—when we go up to New York somewhere I can teach you something. When you do something, do it by yourself." I said, "You got caught."

"I committed a perfect crime."

"Who told you that?" He said, "Listen, don't nobody know what I done but me." I said, "Yes." He said, "I am the only witness."

"What happened, if you committed a perfect crime; what happened?" He begin to tell me about him and the Palms and U.S. 27.

Q. Did he tell you who was in the car?

A. He told me he had a girl in the car who was his wife.

MR. SANDSTROM: I believe that is leading and suggestive. I object to it.

THE COURT: Don't lead him, Mr. Block.

THE WITNESS: He said he was en route to Miami and he planned what to do.

"What was you going to do?" He said, "I planned to kill her, but I changed my mind and went to 5th Avenue where I was staying. I went into the house.

"You went into the house? Where was she?"

"She was in the car." I said, "What was she [290] doing?"

"She was sitting." So he said he came out of the house and got into the car and told her to get in the back seat.

"Why did you tell her that?"

"I just told her to get in the back seat because she was sleeping. I went to the area where I went before, where I had planned to go before." He said, "I rode around there. I went in the area where I had planned to go before, but there was too much traffic in the area."

I said, "What do you mean, where you had planned to go before?" He said, "Once before I planned to do the same thing."

"You mean to tell me you planned a perfect crime? You can't plan a perfect crime. You would have to do it at the time."

"I planned it once before, but I was told that the insurance policy that I had would not pay off."

"What insurance policy did you have?"

"I had straight life."

He then told me he went and got an accidental policy that would pay off.

I said, "Look here, why did you go into the house, what did you get?" He said, "I took my wallet." He didn't say his wallet or her wallet. He had on his pants and [291] he had the driver's license in his pocket. I said, "For what? You can't commit suicide with your driver's license in it. They know who you are."

"I had the driver's license in my pocket just in case they stopped me on the way. I could identify myself." I said, "Oh, you planned that? That was pretty smart." So we talked about what happened. He said he drove the car and jumped out.

"Did you jump out?" He said, "Yes." He said, "I jumped out."

Q. (By Mr. Block) I can't hear you.

A. He told me that he jumped out of the car while the car was either going downgrade or something—I don't know which way—but he jumped out of the car. He went into the canal. He said something about his shoulder. I cut him off then and I started to try to carry him back, but he wasn't—he didn't want to go back.

Q. Did he tell you what happened when he jumped out of the car?

A. He told me that she was in the back of the car while the car was being driven by him, and he didn't tell me

anything about transferring her back to the front. She was still in the back. He jumped out of the car and the car went into the canal.

Q. Did he tell you what happened to him then?

[292] A. He said something about his shoulder. I tried to carry him back to the car as he was driving it. Then he told me, he say, "Nobody didn't see it. There wasn't a lot of people. They don't know what went on. In a deal like that where nobody knows what happened but you, it is a perfect crime."

I said, "That's not a perfect crime. You are in jail. What about your spending almost a year in a jail?"

"My lawyer told me to stay in jail, and when I get out, I will have a large sum of money. He said just stay in jail and wait and everything going to be okay."

"Who is your lawyer?"

"That's okay. Somebody on the outside send me a lawyer."

"Anybody on the outside you want me to contact for you?" He said, "First thing, you ain't going to get out."

"Arrington is going to work me outside." He said, "I'll see if you get out." He said, "If you get out remember what I told you." He said, "For a perfect crime everybody got to be together. The best way to be is be by yourself." So we laid down. That was about 1, 2 o'clock that night. So I asked him, I said, "How do you get information out of a cell?" He said, "I got a pencil and a piece of paper here." He lifted up the mattress and there was a piece of paper. I said, "How do you get information out?"

[293a] "I got connections. If you want some information out, I will get it for you." He said he could call different jailers. He write a letter to ask someone to make a phone call. They would go give him authority to go out and make a phone call. He didn't make one when I was there.

"I can't make no connections." He refused to do anything while I was there. So he said, "Just like I told you about 'Sweet Fragrance of Success,' in that movie is a perfect crime. You don't believe in a perfect crime. You will learn there is such a thing as a perfect crime."

"What do you plan on doing with the money you get from the insurance?" He said, "I used to be a boxer. I want to go back into boxing because I can make a good

boxer. You're a pretty nice size only you have got to train. We buy a lot of nice clothes, move up North and become a boxer."

"I guess you could make it, you're a pretty nice-sized fellow." I said, "If I get out, I will give you my address. Now, if I get out, you contact me when you go out."

"No, everything will be okay. I'll meet you out there somewhere."

"Do you have any cousins or an aunt, anybody in town you want me to contact?" He said, "Don't contact anybody for me because everything is going to be okay. There is someone outside taking care of that for me."

[293] I said, "I actually believe you are crazy just like they told me. You are a rape artist." He said, "I'm not. You just don't believe me. You just watch, I'm going to have a lot of money; I'm going to move up North. Remember what I told you. You're going to burn for killing that Chinaman."

I said, "You check all the records back and you will find plenty of records of things that happen to a colored person that killed another person. You think you committed a perfect crime?" He said, "I did."

"You think you committed a perfect crime? They got you in here. You already confessed it."

"My lawyer told me that those statements couldn't be used in court, that recording I made to Detective Shepherd. Detective Shepherd was a nice fellow. Shepherd had my clothes washed and he treated me nice. He's a pretty nice fellow. Best white fellow there is."

"They are just trying to bait you up. What are you going to tell the Judge about the statements you signed?

"I'm going to tell the Judge that they forced me to sign those statements. I'm going to tell the Judge that they forced me to take the truth serum, I haven't had much education. I sign some statements, but they added statements to it. That's what the lawyer told me to tell." I said, "Yes, maybe you have got a good lawyer." I started [294] to telling him about different lawyers he should get. He said, "How many good lawyers do you know?"

"I know some good lawyers." I named Arrington and Graves. He said, "Okay, but I got everything taken care of for my side."

So he then said that when he gets the money from this insurance that when he paid the lawyer, that he would have enough to go up to New York State.

Q. Until approximately what time did you talk to the defendant Saturday night?

A. We talked late Saturday night because we was going back and forth in the conversation of night life.

Q. Did you wake him up, do you remember the night?

A. I did.

Q. Did he ever wake you up?

A. He woke me up once or twice. I slept directly up over him, and as I would get down to use the commode—he was the kind of a fellow that if you moved, he would wake up—he would say, "How are you doing, Chief? Is everything okay?" Then we would go into a conversation.

Q. Did you ever wake him up for the sole purpose of talking to him during the night?

A. I woke him up one night, I think the second night I woke him up. I was laying down. That was the night we were talking about drowning and it hurt his head.

[295] Q. Did you talk to him the following day, Sunday?

A. I talked to him Sunday morning.

Q. Did he tell you anything that you have not already testified to?

MR. SANDSTROM: That calls for a conclusion.

THE COURT: Overruled.

Q. (By Mr. Block) You may answer the question.

A. We talked about—we started talking about breakfast. I think they served on Sunday morning—I am not sure what they served that Sunday morning—I think it was a cereal which was cornflakes with milk. I gave him my cornflakes and I drunk the milk. I think they also gave us a cup of coffee. I gave him the coffee, and we begin to talk about different things and different crimes that had been committed out in the area.

He told me that he knew a lot about different crimes that had been committed out there.

Q. Did he tell you anything else about the particular crime in question—the death of Minnie Claybon, Minnie Milton?

A. Well, he told me that—he kept stressing to me that

he had committed a perfect crime, that he was the only witness, and when you go to Court, if there are no other witnesses, that your testimony would be the best testimony there is. I told him he didn't commit the perfect crime [296] because he was in jail.

MR. SANDSTROM: That's about the fourth time he has brought that up. That is repetitious.

THE COURT: Let's don't ask for repetitious answers.

Q. (By Mr. Block) When were you released from that cell, when were you taken out?

A. I was released Sunday after dinner.

Q. At any time while you were in the cell with George Milton, did you threaten him in any way?

A. I did not.

Q. Did you offer him any rewards or promises, inducements?

MR. SANDSTROM: I object as calling for a conclusion of this witness and invades the province of the Court and jury.

THE COURT: Overruled. Answer yes or no.

THE WITNESS: No, I did not.

Q. (By Mr. Block) Did he at any time tell you he had been mistreated in any way?

A. He was going to tell the Judge he had been mistreated.

MR. SANDSTROM: I object to it as not being responsive to the question.

THE COURT: Motion to strike will be granted. You are not to consider that as it is not responsive to the [297] question asked.

Q. (By Mr. Block) Did you at any time tell him you were a police officer?

A. I did not.

MR. BLOCK: You may inquire.

THE COURT: Gentlemen, you can take a break. The Court Reporter has got to put more paper in his machine.

(Thereupon the jury retired from the courtroom, and upon their return the following proceedings were had:)

MR. BLOCK: The State waives polling.

MR. SANDSTROM: The defendant waives polling.
THE COURT: You may proceed.

CROSS EXAMINATION

By MR. SANDSTROM:

Q. How long have you been with the Miami Police Department?
A. Approximately two years.
Q. Approximately two years. How many times have you had occasion to be locked up like that with somebody in order to obtain a statement from him?
A. This is the first time.
Q. That was the first time?
A. Yes.
Q. And you were in there for how many days?
[298] A. I was there from Friday night, Saturday, and a half a day Sunday.
Q. And during all of that length of time, did you sit down and take any notes of what was said?
A. I did not.
Q. In other words, all of this is from memory?
A. Yes.
Q. Now, after you got out of there Sunday, did you sit down and make notes then?
A. I went over to Detective Shepherd. I was taken out and carried directly to Detective Shepherd where we went to the station and where I made statements as to what was said at that time.
Q. You didn't make any notes?
A. I didn't make any notes.
Q. You were actively concealing who you were when you were in there?

MR. BLOCK: I object to the phraseology of that question.
THE COURT: Overruled.

Q. (By Mr. Sandstrom) You were actively concealing who you were? That was part of your orders when you went there?
A. It was.
Q. Now, what time of the evening did you first [299] go in there?
A. Approximately 7 or 8 o'clock on July 18th.

Q. Now, had you read any statements about what the purported crime was that this defendant was accused of before you went in there?

A. I did not.

Q. Had anybody discussed the case with you before you went in there with the defendant?

A. I had not.

Q. You hadn't talked or read anything about the case?

THE COURT: You are speaking about this case?

MR. SANDSTROM: About this case.

THE WITNESS: I had not read any official reports, no.

Q. (By Mr. Sandstrom) Then unofficially, what had you read before you went in?

A. I hadn't read, I heard about it.

Q. From whom did you hear about it?

A. Just rumors around in the Negro area.

Q. Just rumors around in the Negro area. What was the information you were possessed of before you went in there?

A. By being a policeman, you receive quite a bit of information such as a colored man killed his wife last [300] night and such things.

That was some of the information I received—a woman was drowned.

Q. A woman was drowned. That was the information that you had?

A. That's right.

Q. Did you have a greater detail than that?

A. No greater detail than that.

Q. From nobody?

A. From nobody.

Q. And did you happen to go down there and look at this car being taken out of the river or anything of that nature?

A. I did not.

Q. You hadn't seen anything about the case and hadn't talked to anyone about the case?

A. No.

Q. When you were talking with this defendant, according to your statement, do you recall correctly that you told him that he must be a rape artist or that you thought he was a rapist?

A. I did.

Q. Because the woman in the car had no pants on; is that right?

A. That's right.

[301] Q. You didn't talk to anybody and you didn't have any reports, and you didn't see anything. Where did you learn she had no pants?

A. As I said before, I received information out of the street prior to the time that I was placed in jail that the woman was about naked.

Q. About naked. Did you receive a report that she had no pants?

A. No, I didn't. I asked him.

Q. I see. Then your statement before that the only report you got was a colored woman was drowned over there, that wasn't quite accurate? You had received some information as to her condition, too, didn't you?

A. As to her condition?

Q. That's right.

THE COURT: You mean the condition in which she was dressed?

MR. SANDSTROM: And her dress or attire.

THE WITNESS: The color of her dress, no.

Q. (By Mr. Sandstrom) A dress or blouse or skirt or housecoat, something like that?

A. To me it was known that she had some top garment, but what it was, I don't know.

Q. Where did this become known to you?

A. After I talked with Milton in the cell.

[302] Q. Well, when did you accuse him of this rape thing—before or after she had been found?

A. I accused him of—I told him they put me in the cell with him because he was crazy. So he tried to explain to me he wasn't crazy. He went to tell me, he said, she didn't have any pants because she was pregnant.

Q. You had accused him prior to that that he was a rapist?

A. I accused him. My knowledge was that he was a rapist.

Q. Because she didn't have any pants on?

A. Right.

Q. That was before he told you about the pants?

A. That's right.

Q. Where did you learn about the pants?

A. I received information from the street.

Q. I see. Now, you started talking with him at 7 o'clock in the evening when you went into that cell. How long did you remain in that cell?

A. I didn't start talking at the time I went into the cell.

Q. You went into the cell at 7 o'clock to be with George Milton. What time did you come out of that cell?

A. That night?

Q. That night.

[303] A. I was let out by a jailer that questioned me about what was my reason for being in the isolation cell.

Q. How long that evening?

A. For approximately three minutes.

Q. Then you went back into that cell?

A. That's right.

Q. When did you next get out of that cell?

A. Sunday.

Q. Sunday. What time Sunday?

A. It was after dinner.

Q. Can you tell with any degree of certainty what time it was?

A. Between 4 and 5 on Sunday evening.

Q. Between 4 and 5 o'clock?

A. Approximately.

Q. In the afternoon?

A. That's right.

Q. Now, when was the last conversation you had with him before you got out of the cell at 4 or 5 o'clock on Sunday?

A. After dinner, Sunday. About then.

Q. About what time after dinner?

A. Between two, three.

Q. What was the last thing he told you?

A. The last thing he told me was, "I'll see you [304] later, my man." I walked out.

Q. What was the last thing about this purported case that we are here today upon that he purportedly told you?

A. I don't understand your question.

Q. Well, let me try again. What was the last thing that George Milton said to you about this case that we are here today on that you recall?

A. The last thing he say when the jailer came to call my name was, I said to him, "You don't want me to tell anybody on the outside?"

"Everything will be all right. My lawyer will contact me from the outside."

Q. That was the last time you had anything to say to him, that is the last thing you said about the case?

A. That is the last thing.

Q. That had nothing to do with the case.

A. I was trying to find out who his lawyer was.

Q. I see. Did he ever tell you that?

A. He didn't.

Q. He just told you about everything else, but he wouldn't tell you that?

A. He told me about everything. He told me not to try to contact anyone for him.

Q. Do you know who his lawyer was?

A. I still don't.

[305] Q. You never saw a card or anything like that in there?

A. No, I did not.

Q. Now, when you got in there at 7 o'clock, did you begin talking with him immediately?

A. I did not.

Q. How long did you remain in there before you started talking with him?

A. Approximately 15 or 20 minutes.

Q. What did you open up your talk with?

A. He started talking to me about what my name was. I went in there with the intention to lead him to believe that I was mad. I jumped right on top of the bunk, so he told me I was in the wrong bunk—I was in his bunk. So I got down and got up on to the top bunk. So I just sat up there a little while, up in the corner.

Q. Who spoke to who first?

A. He spoke to me, "Don't take it so hard." He wanted to know what I was in there for. We then went into the conversation.

Q. When was the first time you got around to talking about this case after you had been there?

A. I tried to open him up the first night but he refused to discuss the case.

Q. How many times did you try to open him up?

[306] A. Two or three times.

Q. Two or three times. Was it one, two, or three?

A. It could be more.

Q. And how often did you try that night to discuss the case with him?

A. I know it was late the first night because I asked him what time they cut the lights off.

Q. What time was that?

A. I can't recall if they cut the lights off.

Q. How late did you talk to him, attempt to talk to him about the case?

A. I couldn't say which time because I didn't have a watch.

Q. Was it before or after midnight that you stopped talking with him on the first night itself?

A. It is imposible to estimate. I couldn't estimate it; I couldn't keep up with it.

Q. You couldn't even estimate it?

A. Well, George could tell the time because he noticed the time the different people changed shifts. He knew different things. He knew what time they changed shifts and checked the cells. It was my first time ever been in jail.

Q. When did you start talking with him, when did you next talk to him?

[307] A. The next morning we began talking. He was up early that morning, and I was laying in the bed because I usually sleep late.

Q. When did this talk about this perfect crime start? Did that start the first night or second day or what?

A. Second day, Saturday, in the daytime.

Q. Before or after lunch?

A. I should say it was maybe approximately before or after lunch, between 11 and 1 o'clock, right around lunch.

Q. Right around mid-day?

A. Right around mid-day.

Q. All right. He said that this was a perfect crime, or something, this case that we are here on today; is that right?

A. Yes, yes.

Q. He was the only one with knowledge of it?

A. Yes.

Q. But he just started telling you all about it?

A. No, he didn't.

Q. When did all this conversation happen? When did it happen, this talk of the perfect crime business?

A. I began to explain to him how keen we had been operating——

Q. Answer my question. Did that talk about this case occur before or after the perfect crime bit?

[308] A. After.

Q. How long afterwards?

A. I couldn't say right now any definite time on that.

Q. The opening part of the perfect crime story was that he had seen a picture about a perfect crime or something?

A. To my knowledge he had told me of a picture where a perfect crime had been committed.

Q. He had told you about a picture he had seen?

A. That's right.

Q. This is what he told you at lunchtime, between 11 and 1 o'clock?

A. No, the first time, before lunch we was discussing what I had done.

Q. But I asked you about this perfect crime stuff. When did he start to talk about it? You said between 11 and 1 o'clock?

A. That's right.

Q. When did he tell you he had committed this perfect crime—before or after that lunchtime?

A. I would say right about the same time. The conversation went that he had committed the perfect crime.

Q. And after he had told you that, then he proceeded to tell you about it; is that it?

[309] A. No.

Q. No? How long was it then that he started to tell you this information that you related?

A. It was soon after I explained to him about the crime I had committed. He told me the mistakes I had made.

Q. When did you do this explaining? Did you do it after that 11 to 1 period?

A. I had told him previously that morning. He said, "Sit down," and he thought about it and stood up and told me about working two men as a team, but he never say anything else about himself until around lunchtime.

Q. That was lunchtime of Saturday?

A. That's right.

Q. And did he continue telling you all about this until you got out—through with lunch on Sunday?

A. No. He didn't explain what he had done until late after I explained what had happened to me. He showed me what was my downfall, what was my reason for being in jail.

Q. How many times did you wake him up Friday night?

A. I woke him up once.

Q. To talk to him about the case?

A. I woke him up Friday night. I asked him something about the lights, I think it was, and he started talking about what time they cut the lights out.

[310] Q. How many times did you wake him up Saturday night?

A. Saturday night was unintentionally. I was getting up to go to the commode.

Q. To the where?

A. To the commode. That's the stool that sits in the cell.

Q. Did you wake him up?

A. As I was moving around the foot of the bed, he woke up automatically.

Q. Did you talk to him about this case?

A. I told him how bad I wished I was out in the streets. We went into the case from there.

Q. But he had already told you, then, on Saturday noon that he had committed the perfect crime and told you about it?

A. That's right.

Q. Then did he keep repeating that all day Saturday and Saturday night and Sunday?

A. He did not. It was a conversation that kept reminding him of what had happened. He kept mentioning it to prove that he wasn't in jail to stay.

Q. When did this talk about your case and the Chinaman take place?

A. I talked about that Friday night and Saturday [311] morning.

Q. But that wasn't true, was it?

A. It was not.

Q. But you told that to George, didn't you?

A. I did.

Q. Did you tell him with an intent for him to believe it?

A. I told—I intended for him to actually believe it.

Q. And you tried all you could to impress him that it was the truth, that you were charged with that crime?

A. I did.

Q. You didn't use your correct name, did you?

A. My name is Archie Langford. I used Archie Lang.

Q. You shortened your last name and used a different name?

A. I did.

Q. Now, when did you have the oatmeal to eat?

A. If I am not mistaken, the oatmeal was eaten Saturday morning or either the cereal Saturday morning and oatmeal was Sunday morning.

Q. You are not sure about that?

A. I am sure both mornings he had both meals.

Q. You are not sure about it. That is the only [312] time you have ever been in jail?

A. Right.

Q. Now, what did you have for supper meal Friday, Saturday and Sunday?

A. For Friday I can't recall. For Saturday we had weiners, sauerkraut and mashed potatoes.

Q. How about Sunday?

A. Sunday we had one of those something like a soup, some beans and a lot of water.

Q: That was the only time you had been in jail, but you can't recall?

A. I didn't eat it. I gave it to him.

Q. Now, did anybody come to see him at all during the time you were in there?

A. Only at night. One jailer he knew—"How are you doing, Chief? Everything okay?" He said, "Okay. Everything okay." He would just come on back and get in bed.

Q. Now, you said something about he told you he had this truth serum treatment; is that right?

A. He told me, that's right.

Q. That they gave him truth serum, laid him on the couch?

A. He was explaining to me how they give truth serum.

Q. Did he say that he was explaining the truth [313] serum because they gave it to him?

A. He told me not to take it because they had made him take something similar.

Q. He told you not to take it because they forced him to take it?

A. He said they either forced him to take it or he had to take it.

Q. Did he tell you about when he had taken it?

A. He told me he didn't want to talk about it, but for me not to take it.

Q. All during the time he was pending trial—wasn't he waiting for a trial?

MR. BLOCK: That is a matter of record.

MR. SANDSTROM: Sure. He might have knowledge of all of it.

THE COURT: He can testify what Milton told him. The records will be the best evidence.

Q. (By Mr. Sandstrom) Was he pending trial then, from the information you obtained from him?

A. Was he pending trial for information I obtained from him? I don't know.

Q. In your conversation with him, did he tell you anything about he was waiting for trial to come up or anything?

A. His lawyer—he told me—he gave me some [314] information he was waiting, how long he would have to wait in jail.

Q. He told you how long he was going to have to stay in?

A. Yes.

Q. How long did he tell you he was?

A. The lawyer said not to get out on bond.

Q. How long did he stay?

A. He didn't say. He gave me a long story to explain to me exactly what was supposed to happen.

Q. Did he also tell you that an indictment had already been filed charging him with this?

A. No, he didn't.

Q. He didn't mention anything about that?

A. He did not.

Q. Did he tell you that he had already told the officers exactly what he told you?

A. He did.

Q. But he told you also that he had committed a perfect crime and nobody knew anything about it?

A. He didn't tell me, he told the officers that.

Q. Did he tell you that he told the officers exactly what he told you or didn't he tell you that?

A. He told me that he had committed a perfect crime and that he had confessed to it.

[315] He told me he had confessed it to Detective Bush in reference to the crime he committed. He was glad he had done it.

Q. He said he had told Detective Bush?

A. Shepherd, Shepherd, I think it was—the officer that cleaned his clothes and had his underwear washed.

Q. He was still calling this a perfect crime?

A. Well, he didn't say he had confesed to the crime of killing the girl. He said he had made statements in reference to the crime that he had confessed to, something he had done earlier.

Q. That has no connection at all with this kind of case?

A. I don't know.

Mr. Block: I object to the statement of counsel as to that.

The Court: I think it is calling for a conclusion. I will sustain the objection.

Q. (By Mr. Sandstrom) Now, did he tell you that he had told the officers about this case here—Detective Shepherd or Detective Bush?

A. He said he had told the officers about it. He had also made a confession in reference to something that happened that night, but he didn't go into details. What he told the detective, he told me. That is his version of [316] what happened.

Q. I say that what he told you, he told the detectives?

A. No.

Q. As a matter of fact, he didn't tell you he had told anybody anything?

A. He did.

Q. I see. But then you said that he said something about he had been advised to say it was forced out; is that right?

A. He said the lawyer told him to say that because he gave voluntary statements the first time.

Q. He gave a voluntary statement?

A. He was willing to get it off his chest. He was glad to.

Q. Tell me the words. You changed it both times now.

What was the way in which he told you he made the statement?

A. He say, "I was over to the City jail, over there, and I talked with the detective. That was a pretty nice white fellow."

Q. What detective?

A. Detective Shepherd. He said he was a pretty nice white fellow, and he said, "He talked with me and I am glad I told him that confession I made."

[317] He said, "I'm glad I told him the confession I made, but my lawyer told me to tell the judge that the statements and the confession that I signed, that I was forced to sign them." He said that his lawyer told him that that information could not be brought into court. So I said they would probably bring it in anyway. He said, "My lawyer going to take care of that."

Q. He didn't say who his lawyer was, where he got this information from?

A. He did not.

Q. And did he say how the lawyer told him to say this was forced out of him?

A. He said the lawyer told him to tell the judge that he signed a statement but that additional words had been added. He said more words had been added.

Q. More words had been added?

A. He didn't have much education. He didn't understand a lot of words.

Q. Now, did he say anything about he had been well-treated or mistreated, anything like that?

A. He explained to me that the detective that handled the first time was a pretty nice guy and he had his underwear and clothes cleaned and fixed up for him.

Q. Did he tell you if anybody had mishandled him or handled him roughly?

[318] A. He told me he would tell the judge he was mishandled.

Q. I am asking you whether he told you he had been mishandled.

A. He didn't tell me they mistreated him at all.

Q. Of course, you didn't record in any fashion any of this conversation that purportedly occurred between you and him?

A. I did not.

Q. Did you attempt to have him make any statement to you after that date in the presence of anybody so it could be recorded?

MR. BLOCK: I don't understand the question.

THE COURT: Do you understand the question?

THE WITNESS: I don't.

Q. (By Mr. Sandstrom) After this time that you were in the cell there with George Milton, did you ever tell him after that time——

THE COURT: Tell who?

Q. (By Mr. Sandstrom) Did you ever tell George Milton to come and make a statement with you and the statement could be taken down by a Stenotype Reporter?

A. I did not.

Q. You never did anything like that?

A. I did not.

[319] Q. There wasn't anybody else there to witness what George Milton purportedly told you?

A. Not in the cell.

Q. Pardon?

A. There was no one in the cell.

Q. Outside of the cell, was there somebody standing there who could report exactly what occurred in there?

A. No, there wasn't, not to my knowledge.

Q. You are the only one that would know of anything that he told you?

A. Right.

Q. And you didn't take any notes of it?

A. Not in jail.

Q. And you never did that before?

A. Never did that before.

Q. Have you done it since?

A. Done what?

Q. The same thing—going into the cell with somebody who was accused of something and talk with him like that, trying to get a statement out of him?

A. I have tried to get statements out of people but I never went in the cell.

Q. This is the only time that that ever occurred?

A. As to my seeking information in reference to a case, no.

[320] Q. I mean by getting in the cell with him.

A. Frankly speaking, I have been in the cell with a prisoner, but I have never been in as a prisoner before.

Q. You have gone there before as an officer to take a statement?

A. Right.

Q. I mean, this same thing, you had never done it before and have done it since—going into the cell, disguising your identity and trying to talk with him?

A. That's right.

Q. Now, during the time you were there, was George sick or anything?

A. To my knowledge, no.

Q. Speak up.

A. To my knowledge, no.

Q. How long had he been confined, do you know?

A. I was told by him that he asked to go in that isolation cell so he could be by himself.

Q. He asked to be put some place all by himself?

A. Right.

Q. I didn't ask that. Did he tell how long he had been confined at that time?

A. He told me how many days he had in jail.

Q. How many days he had in jail—how many days did he have in jail?

[321] A. I can't recall.

Q. You don't remember that either?

A. No.

Q. Do you remember asking him anything about the car that he had on the evening of May 31st?

A. Did I ask him about the car?

Q. Yes.

A. After he told me about the car, I asked him why couldn't she get out.

Q. Did you ask him about the car?

A. About which car?

Q. The description of the car that he had on the 31st.

A. No, I did not.

Q. You didn't know what make or model?

A. I still don't.

Q. You have never seen it?

A. Never have.

Q. And did you notice what he was wearing during the time you were in the cell with George Milton?

A. I did.

Q. What did he have on?

A. He had on a pair of blue pants, or gray pants, a coat, which was hanging up on the window. The pants seemed to me more like a suit. He had a regular Navy or Army tee [322] shirt with shorts on. That's what he wore most of the time he was in jail.

Q. That was the only clothes he had on there?

A. It was the only clothes. It's similar to that blue coat. A real dirty pair of blue pants hanging up to the screen.

Q. How long did you talk to him Saturday night when you were with him?

A. I think we talked way up after midnight. What time it was, I couldn't exactly recall.

Q. Way after midnight. That would be the same as you did on Friday?

A. No, he cut me off short Friday night because I asked him what time they cut off the lights, to try to keep the conversation up.

Q. Now, after he told you about this perfect crime, and told you that he had done this on Saturday afternoon, did you try to get out of that cell at that time or did you have particular orders to remain there, to remain there until Sunday?

A. I was told not to contact anyone but the person that put me in there. That was the only person I was to talk to.

Q. Who was that?

A. Detective Shepherd.

[323] Q. When did you contact him?

A. Well, I did not contact him. He had me released from the jail where he met me at the desk.

Q. That was Sunday evening?

A. Sunday evening.

Q. Were you going to be in there any particular length of time when you went in?

A. No particular length of time.

Q. It was just as long as it took for you to get the statement from him?

A. It was not said that way.

Q. What?

A. It wasn't said exactly how long or how much information to receive. I was just to stay in there until they decided to come and release me, whether I had found out anything.

Q. I see. Then they were going to take you out—if you found something, they would keep you out; if not, they would return you?

MR. BLOCK: That is calling for a conclusion.

MR. SANDSTROM: If he so understood it.

THE COURT: I think so. I will sustain the objection on that ground.

Q. (By Mr. Sandstrom) Was there any kind of a plan as to how long you were to be in there?

[324] A. Not to my knowledge.

Q. Did you volunteer for this or did they come and seek you to send you in for this detail?

A. I would like to explain how it came to be.

Q. Did you ask for the detail?

A. I was officially assigned to the City of Miami Narcotics Squad during, before and prior to this time. A colored officer was suspended from the Homicide Bureau, and I was assigned to the Narcotics Bureau, so they were seeking someone to take this officer's place. The Narcotics Bureau is the office next to the Homicide. I was talking with a few of the fellows around the building, so I was transferred from the Narcotics Bureau to the Homicide Bureau because of the work I had done previously.

Q. That is what you wanted to do?

A. I didn't want to be transferred, but they transferred me anyway.

Q. About this detail, did you ask to be locked up or did they order you to?

A. They didn't order me; they didn't ask me. They just say, "Go and do it." They asked, "How would you like to work special detail for us?"

Q. Did they explain the special detail to you?

A. They explained they wanted me to seek information from George Milton.

[325] Q. What did you say?

A. I said I would try it.

Q. You would try it?

A. Yes, sir.

Q. Now, are you married?

A. I am.

Q. Do you have a family?

A. I have.

Q. Do you live with them?

A. I do.

Q. You were going to be away Friday, Saturday, however long it took?

MR. BLOCK: This is immaterial, incompetent and irrelevant.

THE COURT: What is the purpose of that question, Counsel?

MR. SANDSTROM: All these matters are aimed toward the credibility of this witness.

THE COURT: I will sustain the objection to that because I can't see the materiality of the question.

Q. (By Mr. Sandstrom) Did they explain the detail to you before you went into George Milton's cell?

A. Did they explain the detail I was to do?

Q. They said they had a special detail for you?

A. They explained the detail as to I was to receive information. They explained the detail, the description of the person, and who the person was, and things I was to do.

Q. What were you to do?

A. I was not to let him know I was a police officer. I was not to take down any notes or anything to make him suspicious of the fact that I was a police officer.

Q. You were to do what?

A. To go to the cell and talk with him and stay with him until they released me.

Q. You agreed to that detail?

A. I did.

Q. Now, you said he had mentioned to you about Minnie being pregnant. Did he tell you how long she had been pregnant?

A. Our conversation went—he told me she had been pregnant about three, four months, something like that.

Q. Three or four months?

A. Right.

Q. Did he tell you how long he had been living with her?

A. He did not.

Q. Did he tell you anything about her?

A. No, he did not.

Q. Did he tell you where he lived?

[327] A. Did he tell me where he lived?

Q. With Minnie, yes.

A. He did.

Q. Where did he tell you?

A. On 5th Avenue and 14th Street.

Q. Did he tell you any house number or anything?

A. As I can recall, we talked about the house that he lived in, but what he told me I can't recall.

Q. Did you also talk to him about what kind of work George did?

A. I did.

Q. What did he tell you?

A. He said as a porter to some hotel on the Beach.

Q. Did he tell you what hotel?

A. He did, but I can't recall.

Q. You don't recall. Did he say he was a porter or bellboy?

A. Similar to a bellboy or porter.

Q. Do you remember which it was?

A. I cannot.

Q. Do you remember if he told you how long he had lived in Miami?

A. I can't recall.

Q. You don't remember?

[328] A. We just discussed how long he had been in Miami.

Q. How long he lived here?

A. I can't actually give you the time because I can't recall whether he actually went into telling me the time, the amount of time.

Q. Did he tell you how long he had lived with Minnie?

A. He did not.

Q. To whom have you talked about this case?

A. Who have I talked to about this case?

Q. Yes.

A. I talked to Detective Shepherd, and I talked to Attorney Block.

Q. Attorney whom?

A. Block.

Q. Block. How many times did you talk to him?

A. I talked to him once, one time. I think I talked to him the first time. He was able to take a statement.

Q. When you say "he," you are talking about Shepherd?

A. I am talking to Block. We came back later and we discussed what had happened in the cell, in front of Detective Shepherd.

[329] Q. How long has that been?

A. I can't recall that.

Q. How many times did you talk to Detective Shepherd about the case?

A. I talked with him twice. Once I explained to him what happened while I was in the cell at the county jail.

Q. When was the second time?

A. In front of Attorney Block.

Q. And those are the only times you have talked to these people, either of them?

A. Well, I talked to them today.

Q. Talked to them today, before you went on?

A. Just around here, like you say, "Could he go get some water? Make sure you be there at 9 o'clock."

Q. You didn't discuss the case?

A. Actually, we didn't discuss the case.

Q. Did you read over what you were going to testify to when you came in to testify?

A. No, because I was late.

Q. Well, you said you went to Detective Shepherd and you gave him a report of it, and you gave a report to Mr. Block. Did either of them reduce that to writing so you could look at it?

A. I didn't give a statement to Detective Shepherd. I only made verbal statements. I went to the State's [330] Attorney's office and made a statement in front of him so he could have it recorded.

Q. Detective Shepherd wrote down anything you said?

A. Not to my knowledge.

Q. You didn't see him writing when you were talking to him, did you?

A. We were sitting at a desk. If he was writing while I was talking, writing what I was saying, I couldn't actually say yes or no.

Q. You don't know whether he wrote anything. When you went to see Mr. Block, did they take a copy of your statement at that time?

A. They did.

Q. Did they take it down or take it on a recording?

A. He had a female. I think she took it down.

Q. Operating a machine like that (indicating)?

A. She had a pad.

Q. Now, after she wrote it down, did they ever put it in writing so you could look it over?

A. So I could come and look it over? No.
Q. You never saw that statement since?
A. No.
Q. You have never refreshed your recollection at all?
[331] A. Not to my knowledge.
Q. The only thing you are basing your entire testimony on is from the time that you were in that cell?
A. That's right.
Q. And you haven't been refreshed in any way since?

MR. BLOCK: He has gone over this three times already. This is repetitious.

THE COURT: I think the last question is repetitious.

Q. (By Mr. Sandstrom) When did you first know you were going to be a witness?
A. When did I first know I was going to be a witness?
Q. Yes.
A. I received a subpoena, I think it was around November—around the first of the month.
Q. That is the first time you knew you were going to be a witness in the case?
A. Actually, the first time I knew I was going to be a witness.

MR. SANDSTROM: That will be all at this time. I would like him around so that he may be subject to a recall.
MR. BLOCK: No further questions from the State.

(Witness excused.).

[332] Thereupon—

WILLIAM PAUL MCCLURE

was called as a witness on behalf of the State, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. BLOCK:

Q. Will you please state your full name?
A. William Paul McClure.
Q. And with whom are you connected?
A. Miami Police Department, Homicide Section.
Q. In what way?
A. As a detective.

Q. How long have you been with the Miami Police Department?

A. Eleven years.

Q. Do you know the defendant, George Milton?

A. Yes, I do.

Q. Do you see him here in the courtroom?

A. In the blue coat on the end.

Q. Did you have occasion to talk to the defendant on or about June 11th or 12th of this year?

A. Yes, I did.

Q. Where did you first see the defendant on June 11th, and at approximately what time?

A. On June 11th, I had worked the day shift and [333] I worked late. I didn't see George until a little after 6 o'clock—about 6:30 on the evening of June 11th.

Q. Where was he; who was he with?

A. He was in the office of Detective Warren Holmes at the Municipal Justice Building in Miami.

Q. When you first saw the defendant, through what means did you see him?

A. In Warren Holmes' office. It is divided by a partition. There is an observation room that you can see in the office and the occupants of the office cannot see you in the observation room. I first went to the observation room, and then I went in the main room.

Q. When you first arrived, did the defendant know that you were there?

A. Not when I first arrived.

Q. Approximately how long were you observing the defendant before you made yourself known to him?

A. Just a few minutes. I wanted to hear what the conversation was about before I broke in on it. I left the observation room and went into the main room.

Q. Are you able to hear in the observation room what is going on in the interrogation room?

A. Yes.

Q. Were they standing or seated in the room?

A. Both of them were seated—Warren Holmes was [334] behind the desk and George Milton was at the end of the same desk.

Q. Did you have any conversation with the defendant that evening?

A. Yes, I did.

Q. Prior to talking to him, what, if anything, did you say?

MR. SANDSTROM: I would like the predicate laid. Go into it in the absence of the jury.

THE COURT: Are you up to the conversation now?

MR. BLOCK: Yes, sir, your Honor.

THE COURT: Take the jury out, Mr. Bailiff.

(Thereupon the jury retired from the courtroom, and the following proceedings were had:)

THE COURT: Let's proceed.

Q. (By Mr. Block) Detective McClure, describe the appearance and demeanor of the defendant when you saw him.

A. He was sitting on a chair at the end of a desk, very relaxed. He seemed to be comfortable. He was answering questions easily and voluntarily.

MR. SANDSTROM: I object and move to strike the word voluntarily.

THE COURT: To be stricken.

[335] THE WITNESS: He was answering questions.

Q. (By Mr. Block) Approximately how long were you with the defendant that evening? Tell what you did from the time you saw him until the time that you took the formal statement from him.

A. Well, after I went into the room, I talked to him for about half an hour; and then Mr. Holmes and I went to eat supper.

Q. Where was the defendant at that time?

A. We asked him if he would prefer to go back to the cell or remain in that room, and we would feed him. He said he would rather remain in the room which was more comfortable than the cell.

Q. How was he dressed?

A. He had a shirt with long sleeves and a pair of trousers.

Q. Do you know if he was fed?

A. We brought him two hamburgers and a Coca-Cola.

Q. Approximately what time did you return?

A. We came back about 8:30.

Q. Did you offer the defendant any promises of reward or anything?

MR. SANDSTROM: That calls for a conclusion.

THE WITNESS: He was given no promises.

MR. SANDSTROM: I move to strike the answer.

[336] THE COURT: I would like to hear what actually occurred. Let me make the determination as to whether any promises had been made.

Q. (By Mr. Block) Tell the Court your preliminary conversation, what occurred, what went on.

A. Well, I went in there just about after 6:30, and Warren told me to go ahead and talk to him. So I told Milton that I was going to advise him again that he was under arrest, that I intended to question him further on a point that I had already questioned him on, on the 5th day of the same month; he didn't have to answer my questions and he wouldn't be forced to answer any questions, and that any questions he answered could or may be used in some future court proceedings.

I went on from there and questioned him about the death of Minnie Claybon.

Q. About what?

A. About the death of Minnie Claybon.

Q. Did he answer your questions?

A. Yes, he did.

Q. Did he refuse to answer your questions?

A. No, he didn't.

Q. Approximately how long did you talk to him before you called for a Reporter?

A. I talked to him for half an hour at that time, [337] then we went out and ate until about 8:30.

I didn't talk to him any more until about 11 o'clock.

Q. Was there anybody talking to him in the interim period after you came back from supper?

A. Warren Holmes. I was in the observation room where I could see and hear the conversation.

Q. Any time thereafter, did you go into the room again?

A. Not until 11 o'clock when the stenographer arrived.

Q. Did anything happen prior to that by which you went into that room? Did the defendant call for you or what happened?

A. There was a—I have to go back there, now. We went out and ate. I came back about 8:30. I came back and went into the observation room where I stayed until about

9:30. That's right, about that time. Warren Holmes called me. I had been listening and I knew what was going on. Milton said he wanted to tell Warren Holmes the whole story. He didn't want it to appear that we had to pull this out. It might look like we had to pull the story from him.

He said, "I would like to appear as though I just called for the investigation, or that I told him my story voluntarily, and it didn't have to be pulled out [338] piecemeal." So then I heard Warren call me.

I went around and went into the room. This was about 9:30. Now, before I went in there, however, when Warren Holmes had finished the preliminary hearing, it was about 9 o'clock. When Detective Holmes started to reach the point of his questioning, I turned on the wire recorder, which was recording all the conversations in the room.

Q. Why had you not turned it on previously?

A. It is only a one-hour tape that we have, and the preliminary questions didn't pertain to the crime itself. It was just building up to that point. As soon as he reached that point, I turned on the recorder, and about a half-hour later he called me into the room.

Q. Is that tape available for the Court?

A. Yes, we brought it down.

Q. Now, describe what happened at this point. You say that Warren Holmes called you. What was that all about?

A. Well, George, like I said, told Detective Holmes he didn't want to appear as though we had to pull it out of him. "I want it to appear as if I called for Detective McClure, and I told this whole story to make it appear that I did it voluntarily," he said.

Q. What happened? Did you come? Did he go out? What happened? Tell the Court.

[339] A. I walked into the room and I said, "Hello, George." George said, "Hello, Mr. McClure." I sat down and he started to tell me, "Mr. McClure, I want to tell you this, I want to get it off my chest. It's been on my mind for a long time, and I would like to clear myself with God" —words to that effect.

Then he started to tell me first about the death of his father.

Q. Did he go outside the room and knock on the door? Do you remember that incident?

A. I came in and Warren told me, he explained to me that George wanted to make this appear as though this were a voluntary confession. He was going to go outside and knock on the door. I would answer the door, and he would say, "Hello." This was the way it was set up, sort of an act.

Q. Whose idea was that?

A. George Milton.

Q. Is that on the tape?

A. That is on the tape, just like he proposed it.

Q. And then what happened after he knocked on the door?

A. I opened the door and I said, "Hello, George." He said, "Hello, Mr. McClure." He sat down and he said, [340] "Mr. McClure; I want to tell you this. I want to get this off my mind." He told us about the death of his father. He went on from there to tell us that he had killed Minnie Claybon, they had taken out some insurance policies, and that he said that it wasn't his intent at the time he took out the policy to kill her. It was an afterthought that he decided he could use the money, that this particular night he knew she was in the car, that she was asleep. As he approached the spot which he had observed the day before from the other side of the river, he made a left turn in the area, bailed out of the car—jumped out of the car—and landed on his left shoulder which was injured, and the car went into the river, knowing that Minnie Claybon was in the rear seat and that the momentum of his jumping out carried him into the river.

Somebody pulled him out. That was the manner in which the car went into the river.

Q. Was anything mentioned about reducing that to a formal written statement?

A. Yes. I told him that I would like to have this taken down again. I told him I would like for him to go through the whole story again the next time and that I would like to have him tell me this in the presence of a stenographer who would record it. I went after a stenographer.

Q. And at that time the formal, written statement [341] was taken? Was he again warned of his constitutional rights?

A. Yes.

Q. After the statement was typed up, what was done with him?

A. Well, after the statement was taken in shorthand form, the girl went upstairs to type it up, a type-written statement. I had a photograph taken of George Milton stripped from the waist up, and took him to a physician, where he was given a physical examination. By the time we got back from the doctor's office to our office, the girl had the statement typed up. I read the statement out loud to him, and then I gave him the statement and told him to read it himself and initial the typographical errors I had noticed when I read the statement. The girls had made some erasures, hitting the wrong key and erasures of that sort.

I told him to pick out these erasures and to initial them, initial each page. I told him to initial each page if it was correct, as he recalled the statement. At the end of it, if the entire statement was correct, I told him to sign it and make some kind of a statement in writing, in his own handwriting, indicating whether this was or was not true.

Q. Did he do that?

A. Yes, he did.

Q. Was that done in your presence?

[342] A. Yes.

Q. Did you see him read every page?

A. I did.

Q. Prior to that did you read every page to him?

A. I read the entire statement to him. I gave it to him and told him to correct the erasures.

Q. Were any offers of rewards for giving this statement made?

A. No, there was not.

MR. SANDSTROM: Same objection to that.

Q. (By Mr. Block) Any threats?

A. No.

MR. BLOCK: This goes on the predicate of June 11th. Now, there will also be offered a statement of June 12th. Would your Honor wait until that time until this is offered or shall we go into this?

THE COURT: I want to hear this tape recorder.

MR. BLOCK: We have the doctor here and the tape recorder.

THE COURT: And Mr. Holmes?

MR. BLOCK: Yes, sir. Can we call the doctor so as not to waste any time, or would you rather hear the recorder first?

THE COURT: Do you have it here?

MR. BLOCK: It is upstairs.

[343] THE COURT: Well, let's allow Mr. Sandstrom to examine this witness if he so desires at this time. We will wait for the other.

CROSS EXAMINATION

By MR. SANDSTROM:

Q. How many times prior to the 11th day of June did you question or interrogate this defendant?

A. I questioned him on the 5th day of June. That was all. Then the next time I questioned him was on the occasion of June 11th.

Q. You questioned him again thereafter?

A. I questioned him the next day, June 12th.

Q. You said that you had observed Detective Holmes questioning him, too. By the way, how long a period of time did you question him each time that you questioned him on the first day, on the 5th, and then on the 11th and 12th?

A. On the 5th, I took him out of jail at 10 o'clock, and I questioned him for about——

Q. That is 10 a.m.?

A. A.m. I questioned him for about an hour or an hour and a half, and then he remained there at the office. That was the Homicide Bureau office. I went out and got Dr. Davis and Detective Shepherd, and we went to his room because I had asked him during that questioning if I could [344] search his rooms. He said it was all right.

Q. The room at his house?

A. Yes, the room at his house.

Q. That was the 5th day of June?

A. That was the 5th day of June.

Q. Then you went out and made a search of his house?

A. While he remained at the office.

Q. Did you remove anything from his house?

A. Yes.

Q. What was it?

A. His billfold and some jars that contained fluids and a box of snuff.

Q. How about insurance policies or anything like that?

A. No.

Q. Now, you stated you observed Detective Holmes questioning this defendant. Tell us the time when you saw him questioning him.

A. Well, that was only on June 11th. That was when I arrived about 6:30. I went to the observation room first. I listened to Holmes talking to him, and they were talking about boxing. George was telling him that he aspired to be a boxer at one time earlier in his career, and that he wanted to be a boxer still.

[345] That was the trend of the conversation there.

Q. I didn't ask you the trend. You say you saw Detective Holmes questioning. How long did he question him?

A. That was only about three or four minutes at that time.

Q. That you observed? He was already in the process of questioning when you first noticed him?

A. That's correct.

Q. Did you observe Detective Holmes questioning him on any other occasion?

A. Yes. After that I went in and I talked to him for half an hour. We went to eat. When we came back it was about 8:30, and Holmes questioned him from about 8:30 until pretty nearly until—until 10:30. We sent for the stenographer at about 10:30. So that would be from about 8:30 until 10 or 10:30.

Q. And did you see him questioning this defendant on any other occasion? That is, Detective Holmes?

A. Not Holmes.

Q. Let's go over to Shepherd. Did you have occasion to see Shepherd?

A. Yes, on June 6th, the day following what was my first contact with him.

Q. You saw Detective Shepherd?

A. I was again in the observation room when I [346] listened to Detective Shepherd question the defendant.

Q. Is that the only occasion you had to observe Detective Shepherd questioning him?

A. That is the only time I heard him questioning him.

Q. I don't mean if you heard. Did you have occasion to observe them in any other way with your senses?

A. I don't believe so. I know that Shepherd had him in his company in the hallway a couple of days. I didn't know where they were going.

Q. Since this questioning by Detective Holmes was already in progress on the 11th, you do not know how long it had been before that

A. No.

Q. Now, do you know what cell he was kept in at the City jail?

A. No, I was never back in the cell block so I don't know where he was kept.

Q. You never went to see what cell he might have been in?

A. No.

Q. Do you know how long he had been in custody at the time you took these statements?

A. Not of my own knowledge. I have referred to reports, and I could only say what I know by looking at [347] reports.

Q. On the 1st day of June, he was in custody, wasn't he?

A. Yes.

Q. Then this statement came along on the 11th of June, and he was still in custody, wasn't he?

A. Yes.

Q. You said you advised him he was under arrest?

A. Yes, sir.

Q. What did you advise him he was under arrest for?

A. I had the arrest report in my hand at that time. I told him he was under arrest for investigation of manslaughter.

Q. Manslaughter. Is that a felony or misdemeanor?

Mr. Block: That is calling for a conclusion, a legal conclusion.

The Court: Sustained.

Q. (By Mr. Sandstrom) Did you have the occasion to arrest him for any other thing?

A. I never arrested him, period.

Q. Did you have the occasion to take him to a Magistrate?

A. No.

Q. You never did that?

[348] A. I testified in the Magistrate's Court. I was sent for initiating the action.

Q. I see. You had the report, and then you read from that. You told him he was under arrest for investigation. Did you determine from that report, when he came into custody initially——

MR. BLOCK: I am going to object to any report that is not in evidence.

MR. SANDSTROM: This is their predicate. He advised him of certain things from a report. I want to know——

THE COURT: He said he was under arrest for investigation of manslaughter. I never heard of such a charge.

MR. SANDSTROM: I asked him if he observed from that report how long he had been in custody, upon that particular arrest.

THE COURT: Do you know that?

THE WITNESS: I don't recall. I would have to guess if I were going to answer at all.

Q. (By Mr. Sandstrom) Until the 11th of June, he remained under arrest for that same charge?

A. Yes.

Q. It wasn't changed in any way?

A. I don't know if the warrant had been issued. It wasn't my case. I wasn't aware of whether or not a [349] warrant was issued during the interim—from the 5th to the 11th.

Q. You don't know whether or not a warrant then was issued for this defendant?

A. No, I don't.

Q. You don't know when he was taken into custody by virtue of that warrant?

A. No, I don't.

Q. Did you ever take him before a Magistrate for the purpose of a preliminary hearing?

A. No, I didn't.

MR. BLOCK: He has already answered that.

THE COURT: He has already answered that.

Q. (By Mr. Sandstrom) Do you keep a record of how many times a person interrogates a particular individual who is in custody?

A. Only the times that I interrogate.

Q. That is the only time you would have available to you. There's no general record kept as to who interrogated him and for what periods of time?

A. No.

Q. Do you know if the defendant made any calls to any of his friends or relatives during the period of time that he was in custody? That is, from the 5th of June until the 11th of June?

[350] A. I don't know of my own knowledge. He was in the same room with two telephones for a couple of hours, several hours, on several occasions. I don't know.

Q. Was he advised that he could use it to call somebody?

A. I didn't tell him he could use it. The telephone was there.

Q. You said you advised him of his constitutional rights. Tell me about these rights you advised him of.

A. I only advised him of his rights under the Fifth Amendment. To be specific, on the first contact I had with him, it was on the 5th. I told him that I intended to question him about the death of Minnie Claybon.

Q. You intended to question him?

A. Yes.

Q. Go ahead.

A. He didn't have to answer the questions or make any statements regarding the subject matter, but that they could or may be used against him in some future court proceedings.

Q. Did you tell him you were going to ask him the questions?

A. I was going to ask him questions and he didn't have to answer them.

Q. You were going to do that. Was there any [351] other advice that you gave him at that time?

A. No. I asked him if he had an attorney.

Q. If he had one?

A. Yes.

Q. What was his response?

A. No, he didn't know anyone in town. He was going to get one.

Q. That was the only bit of advice that you gave or received from him?

A. Yes.

Q. Now, you say that when it came around to taking this formal statement, that George wanted, in a particular fashion, to make it appear as though he made a particularly voluntary statement.

A. Yes.

Q. To whom did he want that to appear to be particularly voluntary, did he say?

THE COURT: That's the one that is included in the tape recorder?

THE WITNESS: Yes, sir, your Honor; that is the whole conversation that is on the tape.

Q. (By Mr. Sandstrom) Did he say who he wanted it to appear voluntary to?

A. He didn't want it to look as though we had taken it from him—just what he had reference to, I don't know. [352] We went ahead and went along with his proposition.

Q. Tell me, is that your usual procedure, your going ahead and accommodating a person you are taking a statement from, to take it in any particular fashion that he wants it taken in; in a door-knocking situation?

A. This is the first time this sort of thing has ever been proposed to me. I saw no reason why I shouldn't comply with his wishes. That was his way. If he wanted it that way, I was happy with it.

Q. Were you ever present at a preliminary hearing for this defendant upon this charge that you took the statement about?

A. Yes, I was.

Q. Do you recall the date of that preliminary hearing?

A. No, I don't know.

Q. If I said June 24th, would that refresh your recollection?

A. I still don't recall the exact date of the preliminary hearing. I was there and I testified there.

Q. You didn't take any notes or noted any place where you could refresh your recollection from?

A. No, I didn't.

Q. Do you know if he ever had a preliminary hearing on the 24th, on the occasion when you were present [353] to testify?

A. Not to my own knowledge, no.

Q. By the way, that preliminary hearing that you referred to was taken when I was present?

A. That's right.

Q. Mr. Quick was present?

A. Yes, sir.

Q. Mr. Kogen?

A. Yes.

Q. That was at Judge Christie's?

A. Yes.

MR. SANDSTROM: At this time, your Honor, for the purpose of the predicate with regard to this cause and for the purpose of the predicate with regard to this statement, solely, I would offer to the Court a copy of the warrant of Francis Christie, calling for the arrest of the defendant with regard to the deceased, who was involved in the accident; that is, Minnie Claybon.

In addition thereto, by reference, I would like to incorporate, with regard to this predicate, the entire file of this court, which this Court can take judicial notice of; that is, the habeas corpus. I believe that number is 1969HC, which pertains to the manner in which the defendant was detained regarding the death of Minnie Claybon.

If I can have a minute, I would like to get [354] that file for the purpose of the Court to use it for whatever it may so desire. I would like reference to it incorporated herein in order that the matter of predicate with regard to this statement be properly inquired into.

THE COURT: I still don't understand what you are talking about. You are way behind me or something.

MR. SANDSTROM: Well, at this time, to determine the voluntariness of that statement with regard to this.

THE COURT: What does a file of a certain case—what does a certain court file have to do with the voluntariness of the statement?

MR. SANDSTROM: Because it materially shows that by matters that are of a court order, made by the Circuit Court herein, that this defendant did not have a preliminary hearing ordered for him. He had had it prior to the 24th day of June, 1958. In addition thereto, I am offering in the certified copy of that warrant showing that a warrant was not procured calling for the arrest of this defendant

upon a charge relative to Minnie Claybon until the 13th day of June, 1958.

In addition thereto, I intend to put the defendant on to show his custody came about on the 1st day of June, so that he was held first without any warrant having been issued. I further intend to show that the matters transpiring that he was accorded an opportunity to be brought [355] before a Magistrate immediately or forthwith or without reasonable delay, and he never had occasion to be brought before this Magistrate.

When the particular warrant was procured is the first occasion——

THE COURT: How is the Circuit Court file going to show that?

MR. SANDSTROM: It is not all in there. Parts of it are incorporated——

THE COURT: What parts?

MR. SANDSTROM: First of all, there is a petition of writing, habeas corpus, showing what the situation was. Secondly, there was a writ of habeas corpus issued. Thirdly, the preliminary order entered thereafter stating that they had been.

If I am not mistaken, the preliminary held in that cause on the 24th day of June, that the cause of ——

MR. BLOCK: A preliminary was held on June 24th. There is no doubt about that.

MR. SANDSTROM: But I intend putting on at least my partner, not myself, on the stand with regard to showing that preliminary, which came about on the 24th, came about because a habeas corpus writ had been issued at that time since he was being held without having benefit of being brought before a magistrate. As a result it was therefore [356] held——

THE COURT: I have no objection to your putting on the defendant in any regard at all.

MR. SANDSTROM: That's what I would like to incorporate herein, since the Court may take judicial notice of that corpus number 1969.

THE COURT: I will take judicial notice of my own files. I am not going to let you introduce that evidence because it has no place. I will let you introduce the records of Judge Christie's court, that the warrant was issued on the 13th

day of June, that a preliminary hearing was held on the 24th. That, I don't mind at all, in order to complete your record.

MR. SANDSTROM: Then, at this time, I make a proffer to introduce in evidence the habeas corpus file, No. 1969 of this Court. That is the file number of it.

THE COURT: The proffer will be denied.

MR. SANDSTROM: I believe I came out of turn on this.

THE COURT: Let's proceed.

MR. BLOCK: Can we call Detective Holmes to set it up?

THE COURT: I don't care who you call to set it up.

MR. BLOCK: All right, your Honor.

[357] (Thereupon the tape recording previously referred to, and subsequently marked as "State's Exhibit No. 14," was played to the Court out of the presence of the jury, during which playback, the following proceedings were had:)

MR. SANDSTROM: Are we going to hear the rest of it?

THE COURT: I don't see any use in hearing the rest of it unless you want to hear it. The only thing that concerns me now is the voluntariness of the statement that was made, not what was contained in there. I wanted to see what was contained in there so I could make up my mind as to whether the statement was voluntary, which, of course, I have to do.

MR. SANDSTROM: Surely, but the State having gone ahead and put this thing in, actually they shouldn't have put any part of it in. I know the Court wanted to hear it.

THE COURT: We will hear the rest of it if you want it heard.

MR. SANDSTROM: They have reached the part in there where they mention this truth serum. In the event they haven't anything else, I think we should hear everything else.

THE COURT: I am going to let the jury go at this [358] time. There is no use in their waiting around here. We can get all that we want to get down tonight; if we are going to give it to the jury, we will give it in the morning.

I am going to tell you fellows right now that if you have got charges to the jury, any requested charges, I want them in my office at 8:30 in the morning. I must have

them by that time. Send somebody down with them, bring them yourselves. I want them in my office at 8:30.

I am going to adjourn until 9 o'clock. I am going to send the jury home, and we will work until we get the facts. Don't excuse your witnesses. Bring the jury in.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

MR. BLOCK: The state waives polling, your Honor.

MR. SANDSTROM: The defendant waives polling.

THE COURT: Gentlemen of the jury, we have got quite a prolonged matter to take care of here that apparently I didn't think would take this long, but it is going to take much longer. There is no use in your waiting here. We will do this work while you go home. So we are going to let you go home and come back at 9 o'clock in the morning. We will finish up here on this motion and so forth that we have before us that at this time we are required to take up. [359] There is no use in your staying here. Under the same admonition that I have given you, you will be excused until tomorrow morning until five minutes to nine. Be back here and we will start immediately thereafter. Do not go to the scene of the accident, or whatever you might want to call it. Do not go there under any circumstances.

(Thereupon the jury was excused at 5:32 o'clock p.m., after which the following proceedings were had:)

MR. SANDSTROM: I would like the record to reflect that he doesn't have the whole thing in there. I do request that all of——

THE COURT: He has got as much of it as he can get. The tape recording would be the best evidence anyhow.

MR. SANDSTROM: I don't know that he hasn't got it all. He was shaking his head as if he were not getting it all. It started off with quite a blast. I don't know that he got the initial part. That is quite material.

THE COURT: Let's proceed.

(Thereupon the tape recording previously referred to, was played to its conclusion before the Court.)

THE COURT: Any further testimony?

MR. BLOCK: The State will offer at this time Dr. Davis.

[360] MR. SANDSTROM: I have a couple more questions I would like to ask of this witness.

Q. (By Mr. Sandstrom) This statement that you have just played on the wire recorder is of what date?

A. It was June 11th.

Q. At what time?

A. The tape started at——

THE COURT: I think we went into that.

THE WITNESS: 8:30.

Q. (By Mr. Sandstrom) Now, were you present when the truth serum was administered to him that was mentioned in this statement?

A. No, I wasn't.

Q. Were you aware that had been done?

A. No.

Q. Now, were you present when the lie detector, the polygraph, was applied to him?

A. No.

Q. Were you aware that this had been done?

A. By word of mouth from Holmes, I think. I was aware of it.

Q. When were you first aware that the truth serum had been administered?

A. On the day of that recording, at the time that he mentioned it.

[361] Q. Were you present when that recording was being made?

A. Yes.

Q. Now, prior to the time that he made this statement, he was questioned from 6:30 until 8:30, wasn't he?

A. He was. I questioned him from 6:30 to 7:30, and then Holmes and I ate dinner, from 7:30 until about 8:30. When I came back, he was questioned from 8:30 until 11 o'clock.

Q. Until 11 o'clock. This tape is one hour long?

A. Yes.

Q. That proceeded the 11 o'clock taking of that statement?

A. That's right.

Q. So it started at 10 on your tape; would that be correct?

A. This tape started at about 9 o'clock and ran until about 10, a little after 10. It runs about an hour and two or

three minutes. Then I went out after a stenographer. It took me about an hour to get the stenographer and to come back. I sent for the stenographer. I sat in there with George. It was an hour before she got back—from 10 to about 11.

[362] Q. Do you know who administered the polygraph to him that was mentioned in that statement?

A. I don't know of my own knowledge. I heard. It was Warren Holmes.

Q. Do you know who administered the truth serum?

A. I don't.

Q. Well, from learning like you did about the polygraph do you know anything about as to who administered the truth serum to him?

A. I think it was done by a doctor, a psychiatrist, a Benjamin something-or-other. I don't recall his last name.

Q. Is there any way that you can determine who he was?

A. I can ask Warren Holmes. I think he knows.

MR. SANDSTROM: I think that this will be all at this point.

THE COURT: All right.

WARREN D. HOLMES

was called as a witness on behalf of the State, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. BLOCK:

Q. State your full name, please, sir.

A. Warren D. Holmes.

Q. With whom are you connected?

A. Miami Police Department, Miami, Florida.

Q. How long have you been with the Police Department?

A. Approximately eight years.

Q. Did you see the defendant, George Milton, on the evening of June 11th of this year?

A. Yes, sir.

Q. At approximately what time?

A. I took him out of the City jail at 4:58.

Q. What did you do then?

A. Interrogated him.

Q. Where did you take him?

A. To the Bureau of Identification.

Q. And who was present at that time?

A. I was alone with George until approximately 6:30.

Q. Who arrived at that time?

A. Detective William McClure.

Q. Now, before speaking to the defendant, George Milton, what, if anything, did you tell him?

A. I warned him of his constitutional rights.

THE COURT: What did you say?

Q. (By Mr. Block) What did you tell George?

A. I told George that it was my intention to interview him—"It's my intention to interview you now concerning the death of Minnie Claybon. Before doing it, it is my duty to warn you of your constitutional rights. They are that you do not have to answer any questions or make any statements unless you wish to; that any statement you make must be done freely and voluntarily, and must also be understood that you are not now under duress or coercion; that no one has made you promises for a reward or leniency. At this time you also have the right to counsel. Do you understand what I have just said?"

Q. What did he say?

A. He said, "Yes."

Q. What did you talk to him about before that?

A. From about 5 o'clock until about 6:30 we talked about boxing.

Q. Well, describe to the court what you talked about and why.

A. I was waiting for Detective McClure. I didn't want to enter into the active interrigation, and George was telling me how he used to box, how people thought he was going to be a second Joe Louis. He demonstrated to me how to throw a punch from the shoulder, he shadow boxed a while, and we just discussed boxing in general until McClure arrived.

Q. Were you present during the interrogation after Detective McClure arrived?

A. Yes, sir.

Q. Now, was there any break in the questioning?

A. About 7:30, Detective McClure and I went to the canteen and left George Milton in my office.

Q. Did you talk to him about that? Did you talk to the defendant about leaving him in your office?

A. We asked him whether he wanted to be placed back in the jail cell. He said he would rather remain in my office.

Q. Approximately what time did you return?

A. About 8:30.

Q. Did you bring anything for the defendant?

A. We brought him some hamburgers and a bottle of Coca-Cola.

Q. Did you talk to him again after 8:30?

A. I talked to him for approximately a half an hour.

Q. Where was Detective McClure?

A. He was in the observation room.

Q. Did you know while you were talking to Milton that he at any time before you left the room had turned on the recorder?

A. No, sir.

Q. Where is the recorder kept?

A. In the observation room.

Q. Are you able to turn it on both from the interrogation room and from the observation room?

A. Yes, sir.

Q. Did you turn it on?

A. No, sir.

Q. Was the defendant threatened in any way that evening?

A. No, sir.

Q. Was he offered any promises for a reward of leniency?

A. No, sir.

MR. SANDSTROM: I assume it would be unnecessary for me to object to those or to strike the answer.

Q. (By Mr. Block) Was he mistreated in any way?

A. No, sir.

MR. BLOCK: You may inquire.

CROSS EXAMINATION

By MR. SANDSTROM:

Q. How many times did you have occasion to interrogate the defendant prior to the evening of the 11th of June?

A. I talked to him on three occasions.

Q. When were they?

A. The first time was on the 3rd of June. The second time, on June 4th, and the last time was on June 11th.

Q. Going to this June 3rd occasion, where did you talk to him then?

A. In my office.

Q. And what time of the day or night was that?

A. That was early in the morning, around 6:30.

Q. And for how long did that continue?

A. I didn't talk to him personally. I introduced him to a couple of doctors, and they talked to him.

[374] Q. You didn't talk with him at all on that occasion?

A. It was just a matter of introduction briefly after they examined him.

Q. What doctors were they?

A. Dr. Jack Kapchan, a Ph.D., at the University of Miami, and a Dr. Benjamin Coleman, a psychiatrist.

Q. Now, on the occasion that the doctors were there, was there anything administered to this defendant?

A. Yes, sir.

Q. What was administered, if you know?

A. Sodium amytal.

Q. And who administered that?

A. Dr. Coleman.

Q. And what did the defendant say to that?

A. He desired to have it administered.

Q. I see. Then what happened after it was administered to him?

A. He was interrogated under the influence of sodium amytal.

Q. For how long?

A. I'd say, roughly about 45 minutes.

Q. And at that time he didn't admit or confess to committing any murder upon Minnie Claybon or Minnie Milton, did he?

[375] A. No, sir.

Q. Did you return him to his cell?

A. We returned him to the cell.

Q. Did you notice what cell he was occupying?

A. No, sir.

Q. You don't know what cell he was in?

A. I requested that he be placed in a cell by himself and also to be observed periodically by the guards.

Q. In the cell by himself. I see.

What kind of a door does that have? Has that got a flat plate steel barred door?

A. The doors that I know that are up there are the ones that are solid steel all except for a small opening.

Q. Where is that opening located?

A. Up about head height.

Q. Say about five feet, six feet, about that?

A. About five and a half feet.

Q. What kind of an opening, about how large?

A. That is about five inches square, I would say.

Q. Is that glass over it or just open?

A. It is open.

Q. This cell that he was placed in, does it have some windows in it or does it not have windows?

A. I don't know which one he was placed in.

[376] Q. You didn't pay attention?

A. I didn't take him back:

Q. But you had requested that he be placed in the cell by himself?

A. Yes, sir.

Q. When did you request that?

A. When I brought him up to the jail.

Q. When did you bring him up to the jail?

A. After the serum had been administered.

Q. That was on what date—the 3rd?

A. That was June 3rd.

Q. Then on the 4th of June, I believe you said, you interrogated him again?

A. Yes, sir.

Q. Where was that?

A. In the Bureau of Identification.

Q. What time of the day or night was that?

A. That was at 1:15 p.m., until 2:30 p.m.

Q. Was it the daytime or the nighttime——

A. Daytime.

Q. And do you know if anybody else interrogated him in the interim?

A. No.

Q. You didn't know about that at all?

A. No.

[377] Q. Now, the next time you saw him was on the 11th, I believe you said?

A. Yes, sir.

Q. You didn't see him at all between those dates?

A. No.

Q. During those dates did you order him placed in the cell by himself?

A. The only reason I placed him in a cell after the administration of this serum is generally they feel like talking. Sometimes the fellow prisoners start talking. This is our policy to put them in a cell by themselves, to have a nurse and guard check him.

Q. How long did he remain in this cell by himself, do you know?

A. I couldn't testify to that.

Q. Did you ever send through an order revoking this order about putting him in the cell by himself?

A. No, I assumed that he was placed back in the same cell.

Q. You assumed, but you didn't send any directive?

A. No, sir.

Q. To whom did you furnish this directive?

A. To the guard. I said to make sure that he is in the cell by himself.

Q. During the period from the 4th day of June to [378] the 11th day of June, did you have occasion at all to see the defendant?

A. Not after the 4th until the 11th, no, sir.

Q. Didn't you see him being questioned?

A. No, sir.

Q. Did you have an occasion to apply the polygraph to the defendant?

A. That was on June 4th.

Q. After the serum treatment on the 3rd?

A. Yes, sir.

Q. How long did this polygraph questioning routine operate on the 4th?

A. That was from 1:15 p.m., to 2:30.

Q. He didn't tell you anything about how he had brought about this offense he was accused of in this case?

A. No, sir.

Q. That was on the 4th of June. By the way, on the 3rd or 4th of June, did you have occasion to place him under arrest or anything like that?

A. No, sir.

Q. Did you have an occasion to take him before any Magistrate?

A. No, sir.

Q. When you advised him of his constitutional rights that you mentioned, did he tell you he had a right to [379] be brought before a Magistrate?

A. No, sir.

Q. When you gave him that recitation with regards to his constitutional rights, did you stop each time you reached a new phrase and give him a chance to think about it before making an answer to it? Did you read it off as one long spiel?

A. I didn't read it to him, I said it to him.

Q. Did you say it in one breath?

A. I said it slowly and distinctly so he understood everything I said.

Q. At the conclusion of that, did you ask him if he understood and he said yes?

A. Yes.

Q. When did you tell him that?

A. I told him that each time before he was interviewed; on any occasion, he was warned.

Q. You called him on the 3rd, the 4th, and the 11th.

A. Right.

Q. Now, on the 11th, when you started interrogating him, you kept going over this story, and he didn't tell you anything, and you told him, "Don't give me that baloney. That isn't what I want to hear."

A. That is the truth, sir.

[380] Q. How many times did you have occasion to tell him that?

A. One time.

Q. Just once?

A. I told him I didn't want to hear that baloney.

Q. You wanted to hear a different story?

A. Yes, sir.

Q. Did he comply with it immediately?

A. I spoke with him——

Mr. Block: He is getting into what the tape said.

Mr. Sandstrom: I just asked him if he complied with it. I don't think that calls for what he said.

The Court: I will admit it.

The Witness: I spoke to him from 8:30 until 9 o'clock. He confessed around 9 o'clock.

Q. (By Mr. Sandstrom) Did you have occasion to make

any kind of a listing, or was there a listing available to you, to show how many times this man had been interrogated?

A. No, sir.

Q. Did you tell the defendant that he was being turned over to you by Detective Shepherd who was in charge of his case?

A. Well, each time that he was brought to me, he was—except for the 11th—brought to me by another [381] detective.

Q. Did you ever tell him that Detective Shepherd was turning his case over to you—I mean, George Milton?

A. No case was turned over to me.

Q. Did you tell him any phrase that would approximate such as you were taking over his case, that Detective Shepherd had been on it or anything of that nature?

A. No.

Q. You never made any mention of anything like that?

A. No, sir.

Q. Do you know when this man was ever brought before a Magistrate?

A. No, sir.

Q. Do you know when this man was ever in custody by virtue of a warrant?

A. No, sir.

Q. At the time you questioned him on the 3rd, 4th, and the 11th, do you know if there was then a warrant in existence calling for his arrest upon this offense; that is the charge, the indictment, or any charge similar thereto?

A. No, sir.

Q. You don't know if there was a warrant in existence?

A. No.

[382] Q. Did you make any effort to determine how long he had been incarcerated before you questioned him on the 3rd?

A. No, sir.

Q. Did you make any effort to determine how long he had been incarcerated by the time you questioned him on the 11th.

A. No, sir.

Q. Did you ever learn that the warrant was, in fact, issued for his arrest?

A. No, sir.

Q. Do you know when he was transferred out of the City jail?

A. No, sir.

Q. Do you know who transferred him out?

A. No, sir.

Q. How long, all told, did you speak with him or interrogate him on the 11th?

A. We talked from about 4:58 to about 6:30. It was just general conversation about boxing. From 8:30 to 9 I formally interrogated him regarding the death of Minnie Claybon.

Q. What happened after 9 o'clock?

A. He confessed about 9 o'clock. That is when the period was taken up by his confession.

[383] Q. It couldn't have been 10 o'clock?

A. No, sir.

Q. It was 9. Who was in charge of his case or does anybody become in charge of any case?

A. The cases are generally assigned. In the case of homicide, it is given to a particular investigator but he will call in assistants if it is necessary.

Q. Who was assigned to George Milton's case, if you know?

A. I was under the assumption that it was Charlie Shepherd.

Q. I see. Did he call you in—Charlie Shepherd?

A. Yes, he did.

Q. On each of the occasions that you interrogated him?

A. Not on the 11th.

Q. That one you did yourself?

A. Detective McClure questioned him. I interviewed George on the 11th.

Q. When on the 11th did McClure request you to do this?

A. We had dinner together earlier in the day.

Q. About what time?

A. About 3:30, 4 o'clock.

Q. Did McClure say he would be there, too?

[384] A. We were discussing the case in general. He asked me if I would interview George. I said, "Yes." He had to go home and said he would be back.

Q. At that time you believed this was Charlie Shepherd's case?

A. Well, I am in a position that if they request my services, I do it regardless.

Q. Did McClure say it was one of his cases, this one here?

A. He had been working—I knew he had been working on it.

Q. Now, you were present through the entire taking of the tape and the statement itself, weren't you?

A. Yes, sir.

Q. Now, during that time, at any time did anybody say anything like, "It's better for you if you tell the truth."

A. Yes, sir.

Q. That statement was made. Did anybody tell him his only hope was to tell the truth?

A. That might have been said somewheres.

Q. Did anybody tell him that his cooperation in telling the truth would be good for him?

A. I don't know if those are the exact words.

Q. But the same connotation?

A. Same connotation.

[385] Q. Did anybody tell him it would go easier on him in court if he were to confess?

A. I never made that statement.

Q. I didn't say did you make the statement. I asked if you were present through that time.

A. It might have been made. I don't know, sir.

Q. Can you say it was or can you say it wasn't?

A. I couldn't say either way.

Q. And did anybody tell him anything about, "Now, when we take your formal statement, don't say anything about these long times—this questioning of you—because it will be good for you?"

A. Detective McClure made a statement to that effect because George asked us—he felt bad because he had volunteered out the confession. It was necessary for us to tell Mac, as a favor to him, because he requested it.

Q. Well, did McClure say it or did George say it to him? Did Mac say, "George, don't mention anything about these long times we have been questioning you, because it will be better for you"?

MR. BLOCK: All this is on the tape and has already been heard by the Court. It is repetitious.

THE COURT: Overruled.

Q. (By Mr. Sandstrom) was that said?

A. McClure said he would comply with George's [386] wish that the confession would——

Q. Answer my question first. Did McClure say that?

A. Would you repeat it, please?

Q. Did he say, "George, don't mention anything about the long times we are questioning you. It would be better for you."

A. He said something in a general sense. I couldn't swear that that was the exact words.

Q. Would you say that that is the connotation of what he said?

THE COURT: That is calling for an opinion.

MR. SANDSTROM: He heard him. If he has no recollection, I just want to know if that is as close as he could come.

Q. (By Mr. Sandstrom) Could you tell me what the words were, to the best of your recollection that Shepherd said to you, in the nature of what I just asked you?

A. You mean McClure?

Q. Yes.

A. He said in essence, that he was going to take this statement in accordance with what he desired to show that he had volunteered the confession. It was not necessary for us to talk to him.

Q. Now, did Shepherd—I mean McClure, in your [387] presence just before this statement was taken, say, "We'll start right from the beginning. We will open the door. You say 'Hello,' and we will start from there"? McClure also said that, didn't he?

A. No, George said that.

Q. George said to do it that way?

A. George said that.

Q. Whose suggestion was it that you act as though nothing had ever transpired earlier that day? Was it George's suggestion or McClure's suggestion or yours?

A. George suggested it. He is the one that suggested that.

Q. How many times do you comply with suggestions of that nature, taking statements?

MR. BLOCK: That question is improper.

THE COURT: Sustained.

Q. (By Mr. Sandstrom) Have you ever had an occasion or an offer of a similar request to act in a similar fashion with any other people?

A. I never heard of it before. I have never participated in one.

Q. By the way, how long have you been with the Miami Police Department?

A. Eight years.

Q. How long have you been in the detective capacity?

[388] A. About three and a half years.

Q. And during the time that you have been in the Miami Police Department, how many occasions have you had to interrogate persons?

A. I do it eight hours a day, six days a week.

Q. That is your particular business, to interrogate?

A. That's all I do.

Q. Take statements and interrogate?

A. Yes, sir.

Q. Prior to the time you took George's, for how long a period of time did you do that?

A. About three and a half years.

Q. About three and a half years. Did you determine whether or not George had ever been in the hands of the law enforcement officers to be interrogated?

A. No.

Q. Now, did George appear vigorous and ready to answer these questions or was he extremely reluctant?

A. He was reluctant to answer some questions and others, he was quite talkative.

Q. As a matter of fact, did you attempt for that hour and a half, from 4:30 until 6 o'clock, or an approximate time in that area, to get a statement from him—or 5 o'clock to 6:30—to obtain a statement from him?

A. No.

[389] Q. He refused throughout that time?

A. No.

Q. The first time he gave you any kind of a statement or admission or anything in any manner of form or kind of guilt with regard to this charge that we are here upon today was the 11th of June, isn't that true?

A. Yes, sir.

Q. Prior to that time, he had not?

A. That is the first time, the first time I was present

when a statement was being made in regard to this case.

Q. The first time he made any confession or admission or statement with regard to the accusation in this case?

A. In my presence.

Q. Was there any drug administered on the 11th of June?

A. No, sir.

Q. Was there any drug administered when you took the polygraph test on the 4th of June?

A. No, sir.

Q. There was that one occasion?

A. One occasion.

Q. By the way, was George represented by counsel throughout the entire time or do you know?

[390] A. Never brought to my attention that he was represented by counsel.

Q. Did you ask him if he had any counsel?

A. I warned him as much. He had a right to counsel.

Q. Did you determine whether he had one or not?

A. No, sir.

Q. Did you determine whether he had a visitation, friends or relatives, during the period of time—during the 3rd day of June until the 11th of June?

A. I personally didn't determine that, no, sir.

Q. Did you determine whether he had been confined all that period?

A. I assumed that he had been confined, yes, sir.

MR. SANDSTROM: I think that is all I will require.

MR. BLOCK: Nothing further from the State.

MR. SANDSTROM: What is your size physically; how tall are you? What do you weigh?

THE WITNESS: Six, two; 200 pounds.

(Witness excused.)

[391] GEORGE MILTON,

the Defendant herein, was called as a witness on his own behalf, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By MR. SANDSTROM:

Q. State your name.

A. George Milton.

Q. After the 31st of May of this year, did you come into custody?

A. I came into the custody on the 1st day of June. That is when I came into custody by the police.

Q. Now, where were you taken when you were in custody?

A. Well, I was taken to the jail house.

Q. Where was that, do you know?

A. Well, it's here in Miami.

Q. Was that County jail or the City jail?

A. It was a City jail.

Q. Now, what kind of a cell were you in?

A. I was in an isolated cell all by myself.

Q. Now, describe that cell, about how large is it?

A. Well, the cell, it's about possibly, maybe, [392] three or four feet long, and maybe, possibly, three feet wide.

Q. You mean it was shorter than you are?

A. Well, it's about—roughly about three feet wide or four feet wide, and it's roughly no more than six feet long. I would give a good imagination of it because I was there.

Q. Are there any furnishings in there?

A. Well, there's an iron bunk for you to lay on and there's a commode that you can use. There's a place that you can take your hand and drink water.

Q. Now, are there any windows in there?

A. No, there was no windows whatsoever. You couldn't see anything.

Q. How about the door? What kind of a door is that? Describe it, please.

A. The door was a metal door. It was metal and it had a little, possibly about an opening along about your eyes where you could see out of there. But that all depends whether they left the little slide door up. It's in the middle of the door, in the metal door. It's a slide door.

Now, you can only see out of there if they slide out the peephole, or you can't see whatsoever. You are in the dark. That's all.

Q. Where did you get your light from?

[393] A. It's a light in there when they turn it on.

Q. Is there a bulb in there or just a place where it shines through?

A. The bulb itself is a container, a little glass cage is the bulb itself.

Q. You can't get to the bulb?

A. No.

Q. How long did you stay in that cell in the City jail?

A. I was there for 16 days.

Q. At the City——

A. I was in the City jail for 16 days.

Q. And were you in that same cell all the while?

A. I was in the same isolated cell all the time I was there.

Q. Now, how many persons questioned you, do you recall?

A. I can't call directly, but I was interrogated long hours almost every day.

Q. Do you remember anybody who interrogated you?

A. Well, I remember Mr. Warren Holmes especially; I remember him.

Q. Who else?

A. Mr. McClure.

Q. Who else?

[394] A. I remember Mr. Charlie Shepherd. I remember him.

Q. Was there anyone else?

A. There was at one time—there were some more policemen in the room when they were swearing at me and jumping down my throat calling me all kinds of names.

Q. When was the first time you were interrogated from the time you got in that jail?

A. Well, I came in the jail on—well, the first time I was interrogated was, I believe it was on June 3rd. That was the time that I really remember, but I was interrogated all along. But I remember June 3rd. I also remember June 4th, and—like I said, I was interrogated a number of times. I just can't remember. I do remember one, especially. I remember the 11th day of June.

Q. Don't get ahead of me, now. How about during the period from the 3rd to the 11th? Were you interrogated every day or were there skips? Tell us about that.

A. Well, sometime they would interrogate me every day. I wouldn't see anybody that day. The next day, they would start interrogating me all over again, asking me questions.

Q. Were you ever taken before a judge during the time you were in the City jail?

A. No, not for 16 days. I was in solitary [395] confinement in an isolated cell by myself for 16 days.

Q. Did they ever show you any kind of a warrant?

A. No, they never showed me anything. As a matter of fact, they never told me anything about it except they just kept asking me questions. I tried to answer them, tell them the best that I could.

Q. Now, calling your attention to the 3rd day of June, was there any kind of a drug or anything administered to you?

A. Well, the way that were, it were a matter of satisfaction because of the fact I was—because of the fact I was a wrong person in this particular case. I wanted to be honest and truthful.

Q. Answer my question first before you go into that. Was there any drug administered to you?

A. Well, there were one. I would like to add this: At first when I was mentioned there was drugs, but I was told about the situation and they asked me, "Were you telling the truth?" First of all, when he asked me about it, I said, told him everything that I know.

THE COURT: Just answer your attorney's question. Would you do that?

THE WITNESS: I am sorry.

Q. (By Mr. Sandstrom) There were drugs administered to you on the 3rd?

[396] A. There were drugs taken to me on the 3rd, but they told me this——

Q. Just answer my question.

A. There were drugs.

Q. How did they give you the drugs?

A. Well, there were a doctor——

Q. Did you take it swallowing a pill or by a shot or how was it?

A. It was by a shot, I believe.

Q. Where did they give you this shot—in the arm, leg, or where, if you remember?

A. I believe it was in the arm.

Q. Do you remember which arm?

A. It was—no, I can't remember.

Q. Now, did they also give you any kind of a lie detector test?

A. Well, I don't—I don't know anything.

Q. Did they hook any kind of wires or gadgets to you at any place?

A. Yes; come to think of it.

Q. Do you remember what day it was then? Was it on the 4th of June? Would that be correct?

MR. BLOCK: I object to counsel testifying.

THE COURT: I think you are leading him.

THE WITNESS: The 3rd or the 4th day would be [397] either one or the other.

Q. (By Mr. Sandstrom) Now, how many times did Detective Shepherd interrogate you, if you remember?

A. Well, I remember Detective Shepherd——

Q. Tell me first, how many times. Listen to the question, please, George.

A. I remember—I can't just call it direct the number of times but it was roughly two or three times that he asked me, interrogated me, questioned me.

Q. How about Detective Shepherd? About how many times did he interrogate you—I mean McClure. I said Shepherd already.

A. About the same number of times, I suppose; maybe more.

Q. How about Holmes?

A. Well, Mr. Holmes, he maybe three or four times, I believe.

Q. Going now to the 11th day of June, what cell were you in on that day?

A. Well, I was in the same cell that I were in the 1st of June, that I came in there.

Q. Were you taken out of the cell on the 11th of June?

A. I was taken out of the cell, that cell.

Q. To where?

[398] A. First I was taken out of the cell and taken up to the front, and when I got up to the front, like a little desk, well, Mr. Warren Holmes told me to come with him.

Q. Where did you go?

A. Well, we went down the elevator toward a little room.

Q. What was in that room?

A. Well, it was to me—it was just a little room. That's about all I know.

Q. Were there tables and chairs and lights in there?

A. It was a small table, chairs, just like a regular table.

Q. Did you have occasion to be questioned by Mr. Holmes on that occasion?

A. Yes, sir.

Q. Now, what was the first thing that he told you when he started to question you?

A. Well, after we got into the room, he told me to sit down. I sat down. Then Mr. Holmes told me, he said, "Milton." I say, "Yes, sir." He said, "Detective Shepherd, who is in charge of your case, turned you over to me. He said that so far you won't tell him the truth about this thing."

So I said, "Mr. Holmes, I told Detective [399] Shepherd everything that I know."

"Well, he turned you over to me tonight. We are going to have a statement out of you this night."

He said, "First of all, now you tell me what happened." So I told Detective—Mr. Holmes what happened the best I could.

After I finished, he said, "Now, wait a minute. I am going to quit here with that baloney. That's the same kind of baloney that you gave. I am not going to hear any more. Don't you say any more. We are going to get this thing down to the business. I am not going to listen to that story. You know you are just telling something that—"

Well, I can't say what he said. —"that's not the truth," I says, "Mr. Holmes, well, all I can do is tell you the truth of what I know."

"Well, we are not going to have that. I'll tell you something. After Detective Shepherd told me to take care of this, get this matter straightened out, I have been looking over your case, and this is what I see happened after going to the scene of the accident and so on. I personally believe that you deliberately drove that car into the canal in order that your wife would die and Detective Shepherd told me that your wife and you had a great amount of insurance."

And when he said that, he went into the drawer [400] and throwed these insurances policies in my face and said, "Now, look here. We are going to get this straight tonight. I know that you drove the car into the canal. You meant for your wife to die and you would collect the insurance. Now, we are not going to beat around the bush with this. As soon as you sign the statements and tell us you did drive the car into the canal, then we will let you go; otherwise

you are going to stay here if it is a thousand years. You are going to stay here. You have already been here for 11 days."

So I told him that I had already told Detective Shepherd all I know about this.

"Well, we are talking about right now. You and me are here alone. You are going to tell me about it," After that he said, "Now, you know that you deliberately drove the car into the canal." I said, "That's not true, sir."

He said, "Shut up. Don't say that no more." By that time I stood up and I said, "What time is it, Mr. Holmes?" He said, "Never mind what time it is. If you are thinking I'm fixing to take you back to that cell again you are making a mistake. You are not going to see that cell again. A few friends of mine are going to be over here and we are going to take you for a ride out in the country."

Well, at that point, well, I began to get [401] scared. "Now sit down and let's get back to this conversation. You don't have to talk if you don't want to. We are going to fix it up. My friends are going to take you for a ride."

I got scared and tried to open the door to get out of there before his friends came. So he caught me by the arm and twisted it behind me, behind my back, and shoved me over against the wall.

"Look here, Milton, I am not going to monkey around with you any longer. If you want to do this peacefully we'll do it. If you don't do it peacefully, or don't want to tell me, or you want to call me a liar about what I told you that you did——"

"Well, no sir, Mr. Holmes. I don't want to tell you that." I said, "I just don't do that. It just isn't true." So he walked over to the table and took his cigar out of his mouth and laid it on the table. He rolled up his sleeves and walked back over to me. I was still standing there by the wall.

"Now, I told you that I didn't deliberately drive the car into the canal."

"I want to know if you are going to cooperate with me or not." Well, at that point, well I said, "Well, Mr. Warren, yes, sir." So he walked back over to the table and he said, "That sounds better, now. Now, tell me what [402] you did."

"Just like you said, Mr. Warren, just like you said. I was thinking about the insurance."

THE COURT: What time did this occur? What time of night on June 11th, did this occur—between 5 and 6, 6:30 or 7:30, 7:30 or 8:30?

THE WITNESS: Well, the exact time was 6:30. I was taken out of the cell and from then on I was—to get back to what I was saying——

THE COURT: I didn't understand. You said that at exactly 6:30 this conversation was taking place?

THE WITNESS: I was taken out of the cell.

THE COURT: You were taken out of the cell at 6:30 on the 11th?

THE WITNESS: At 6:30 on the 11th day of June.

THE COURT: Who was questioning you at that time?

THE WITNESS: Mr. Warren Holmes.

THE COURT: Was he the only one in the room?

THE WITNESS: Yes.

THE COURT: How long did he continue to question you from what time to what time—from 6:30 to what time?

THE WITNESS: It were 6:30 until—I can't say until when, but I know it was—well, it was a question of maybe two or three hours or something like that but I know, to get back to what I was saying——

[403] THE COURT: I don't want you to get back. Answer my question. My question is what time was it that you started telling him this tale that you are saying?

THE WITNESS: Well, I was telling—I wasn't telling him a tale. I was telling him the truth.

THE COURT: Whatever you told him.

THE WITNESS: Well——

THE COURT: You said, "All right, Mr. Warren, I'll do this and do that." Approximately what time was that?

THE WITNESS: Well, it should have been—I wasn't in a position to think about the time. All I want to do was get out of there before the rest of his friends he talked about was coming. But to just to give you an estimation, I would say 8 o'clock or 9 o'clock.

THE COURT: All right, go ahead.

THE WITNESS: So after that, he said, or I said, "All right, Mr. Warren." He said, "Now, that sounds better. You come over here and set down." So I came from that wall and sat down. He said, "Now, suppose we go into this." So we went into it.

He said, "Now, you deliberately drove the car into the canal, you know, like you said before." I said, "Mr. Warren, just like I told Detective Shepherd, I told him everything that I know."

"It's not. What we are going to get is just [404] like I said. You deliberately drove your car into the canal, and this here is the insurance to prove that you lied." He pushed the insurance policy in my face. So, at that point, He said, "Now, how about this?" I said, "Well, Mr. Warren, I can't call you no liar and say that you are wrong about it."

H say, "Well, you had better not do that if you know what's good for you." I said, "Well, I wasn't going to say that, but, well—yes, sir, Mr. Warren." That's the only thing I could say.

"Now, that sounds better." He went outside the door and when he came back, he and Detective McClure was with him. He said, "Now, you tell Detective McClure the same thing you told me." So Detective McClure came in and sat down. He said, "Now, you go ahead, George, and tell Detective McClure the same thing you told me about you deliberately drove that car into the canal. Well, now, go ahead and tell him."

Well, after that, well I told him that I did it—deliberately drove the car into the canal like he said I did, and I did it for the purpose to collect the insurance just like he said. He said, "Now, we know you did this because here is the insurance policy to show that is what you did."

"Well, yes, sir, you're right about what you said." There was nothing else I could say. He said, "Now, [405] if you cooperate with us, we will take you back to the cell and there won't be any more bothering you any more."

He says, "Now, as a matter of fact, we'll have to get this straightened out." I told him, I said, "Mr. Holmes," I said, "I told Detective Shepherd everything that I know about this." He said, "Wait a minute. You just told me that you had the insurance in mind."

He said, "Now, wait a minute. I am going to have to get this thing straight." So after he and Mr. McClure were swearing at me, calling me names that I can't say in the courtroom, and then all of a sudden they turned the lights on. It begin to get warm there. I was sweating. Then I said, I told him, "It's getting hot in here."

"You just think it's hot." And then about 30 minutes,

that room got so hot until it was almost impossible to stay in there. Then he said, "Now you are just imagining things. It isn't hot in here." And then he would go out and Detective McClure, Mr. McClure, would question me; and then he would come back in and then Mr. McClure go out. They was taking turns of going out and coming back in. I just had to set there because they forced me to set there until they finished taking turns going out, going in, like that.

Then, finally, well, they wasn't anything else I could do. So often he told me all I have to say—all I said was that it was because of the insurance and that I [406] deliberately drived the car into the canal. That's all I would have to say.

He told me, "You don't have to tell us. We know that you did this. Here's the insurance policy to prove it." Well, all right, I couldn't stand that room any more because it was too hot in there, and I had to get out.

"As soon as you tell us, we'll let you out. We will take you out of here." After what seemed like about maybe an hour or so, an hour and a half in this room, then they took me out after I said that like he said that I deliberately drove the car into the canal and it was because of the insurance. That's all I had to say, and they take me out of the room.'

Q. (By Mr. Sandstrom) Where did he take you?

A. They took me into another room. In this room they said, "Now, what did you do, George? You don't want to go into that room any more?" I said, "No, sir."

"Now; it's going to be a lady coming in here. I am going to ask you two questions." He said, "First of all," he said, "now, when the lady comes in, you just look directly at me and Mr. McClure and all you say is what you already—you know what you said."

So then, sure enough, the lady came in. Then he said, "Go ahead." But just then he said, "Go ahead." After he said, "Go ahead," then I said—I said, first of all—[407] I didn't say anything for a minute, and then he looked at me. After he looked at me, then I said, "I was thinking about the insurance and that I deliberately driving the car into the canal." That was all that I had to say. That's all he wanted me to say. After that, then, this lady left. Then he said, "Now, George, that wasn't so bad after all, was it?" I didn't say anything. He said, "George, I am talking to you."

I said, "Well, no, sir, Mr. Holmes, that wasn't so bad." He said, "Now," he said, "we are going to take you for a little ride." I said, "For a little ride? Mr. Warren," I said, "after all, I said what you told me to say. What you want me to say?"

"Well, now, we are not going to do anything to you. We are just going to take you over to the hospital. That's all." So I said, "All right, Mr. Warren."

We went down to the car and got in the car and sure enough they took me to the hospital, but I was scared. I thought they were going to take me to the hospital and then take me out to some place else like he said he was going to do earlier. But sure enough, he kept his word. He didn't take me anywhere else. He just take me to the hospital.

In the hospital he told me to set down while he and Mr. McClure was talking with some more men and after they talked with some more men, then one man came over to me and he said, "Milton." I said, "Yes, sir."

[408] "Come in this little room with me." I went into the room with him. He said, "How are you feeling?" I said, "I'm feeling all right, sir." He said, "Do your head hurt, anything like that?" I said, "No, sir." He said, "Okay, come out in the room. Let's go into the front room."

When we got in the front room, I sat down and then Mr. Warren Holmes was waiting for me. After that he said, "Come on, let's go." Then we got back to the City jail. After we got back to the City jail, we went to a little room.

THE COURT: Did the doctor examine you at the hospital? Did he have you take off your shirt and then take off your pants?

THE WITNESS: No, sir.

THE COURT: Do you remember that doctor who testified here—Dr. Davis? Did you see him over there?

THE WITNESS: Yes, sir, I remember him.

THE COURT: He did not examine you at all that night?

THE WITNESS: That's the truth. He didn't have me to take off any clothes or anything. He just asked me, "How are you feeling?"

Q. (By Mr. Sandstrom) So the doctor examined you?

MR. BLOCK: I object. That is not what the witness testified to.

THE COURT: He said Dr. Davis did not examine him.

Q. (By Mr. Sandstrom) What kind of clothes did you have on at that time, George?

A. I had on a pair of pants and shirt.

Q. Were your sleeves up or down?

A. My sleeves—well, actually, it was a shortsleeved shirt.

Q. He could see your arms?

A. Well, yes, sir.

Q. Did he feel your head?

A. No, he didn't put his hands on me. He just asked me how I was feeling. I told him I was feeling all right. That was all. He didn't take off my shirt or put his hands on me.

THE COURT: Did you take off your shirt?

THE WITNESS: No, sir, he did not ask me to take off my shirt.

Q. (By Mr. Sandstrom) Now, after you were out there at the hospital, where did you go then?

A. After we left the hospital, they taking me then back to the City jail. After we got to the City jail, they take me to a little room where there is some more policemen. Then Detective Holmes came over to me and he took his pen out of his shirt pocket and told me, he says, "Now, [410] Milton, you sign this."

So he said to sign it, so I signed it.

"Now, under this, you write underneath this that you signed it of your own free will, understand?" Well, I couldn't spell it. So he said, "I will spell it out for you. You just write your name and I will spell it out for you, that you signed it with your own free will." And he told me how to do that.

After that he told me, he said, "Now, Milton, now that you told me all about it with your own free will, how do you feel now?" I didn't say anything. Then he looked at me, he said, "Milton, I am talking to you." I said, "I feel all right, Mr. Warren." And then after that, Mr. Warren taking me back down to the cell that I were in.

Q. Same cell?

A. Yes, sir, it was the same cell. After I got back down to the desk, then one of the jailers came and taking me inside to the same cell I were in. But on the next morning, Mr. Bruton came in and he said, "Hello."

Q. Don't keep running over after you have answered the question. Stop right there.

Now, how long was it before you saw a judge after you made that statement?

A. Well, after that it was at least pretty close to three weeks. It was at least three weeks.

[411] Q. Do you remember the date?

A. Well, I was—I believe it was the 24th day of June.

Q. The 24th day of June. And do you remember where you went, what judge it was?

A. I went to the Hon. Judge Christie.

Q. Christie?

A. Christie.

Q. And where were you then, what jail did they get you from when they took you before the judge?

A. On the 16th day of June, I was taken out of the City jail. I was taken over to the County jail.

Q. To the County?

A. That's right.

Q. That is right in this building?

A. Yes, sir.

Q. And it was from there you went to Judge Christie?

A. Yes, sir. I would like to add this——

THE COURT: I don't want you adding anything. Just answer the question that your counsel asks you.

Q. (By Mr. Sandstrom) Have you ever been interrogated by a law enforcement officer before?

A. No, sir, I never talk with a policeman or anybody. I have never been in custody to the police before.

[412] Q. Did you, during the time that you were at the City jail, attempt to make any phone calls?

A. I asked if I could call my wife's folks——

THE COURT: Who did you ask?

THE WITNESS: I asked the jailer.

THE COURT: Who is the jailer?

THE WITNESS: I can't remember the jailer's name. All he said was he have to go and ask his boss or someone. But, anyway, when he served supper, he said no. I asked him could I call and he said no. Well, I was still under investigation.

THE COURT: That's the answer.

Q. (By Mr. Sandstrom) Now, did you, during the time you were in that jail, have any relatives or visitors come? I am speaking now of the City jail.

A. No, I didn't.

Q. Did you have occasion, during the time that you were there, to make any phone calls?

A. No, I wasn't allowed to.

Q. And were you furnished any writing paper or anything so you could write to anybody?

A. No.

Q. Did you have any writing paper?

A. No.

Q. Where were you educated, George? Where did [413] you go to school? Did you go to school?

A. Well, yes, sir.

Q. Where did you go to school?

A. Mississippi.

Q. In what city?

A. Hollandale.

Q. What school did you attend there?

A. Simmons School.

Q. Simmons?

A. Yes, sir.

Q. And how far did you go in that school, do you know?

A. I went—when I left school, I was in the 6th grade.

Q. You went to the 6th grade in a Hollandale school?

A. Yes, sir.

Q. Did you go to any other school?

A. No, sir.

MR. SANDSTROM: You may inquire.

CROSS EXAMINATION

By MR. BLOCK:

Q. Do you box?

A. Yes, sir.

Q. What is your boxing weight?

[414] A. 185.

Q. What class do you box in?

A. I am a heavyweight.

Q. How tall are you—six, three; six, four?

A. Six, two, I believe, something like that.

Q. While you were in the City jail did anybody bring you any magazines to read?

A. No, I didn't have any books.

Q. You remember Mr. Bruton, don't you?

A. Yes, sir, I remember Mr. Bruton.

Q. Who was Mr. Bruton?

A. Well, Mr. Bruton is one of the jailers.

Q. Did he ever bring you any magazines to read?

A. Well, no, I didn't have any magazines or anything like that to read.

Q. Did you ever have anyone else in your cell with you while you were in the City jail?

A. No, I was just in the cell all by myself.

Q. How many times did you tell Mr. Bruton or one of the other jailers that you would like to talk to a police officer?

A. Well, I never said anything about I would like to talk to a police officer.

Q. While you were in the City jail, did you at any time ever tell Mr. Bruton, the jailer, that you wanted [415] to talk to any police officer?

A. No.

Q. You heard that tape recording, didn't you, George?

A. I did.

Q. That is not your voice, is it?

A. Well, that is not my voice because I never even said some of these things that were said.

Q. You never said what was on that tape recording, did you?

A. No, I mean—I never—after I listened to some of the things that were said on there, I definitely know that it certainly wasn't my voice because I never said some of the things that they said was on there.

Q. That is not you?

A. Well, I think you have asked that.

THE COURT: You just answer the question, George. Don't answer him that way, please. Just answer his questions.

THE WITNESS: Yes, sir, your Honor.

Q. (By Mr. Block) Do you know Ed Williams?

A. (No response)

Q. Do you know Deputy Sheriff Ed Williams from Polk County?

A. Yes, sir.

Q. Did you ever talk to him?

[416] A. Yes, sir, I talked to him.

Q. Did you talk to him while you were up in Haines City?

A. Well, no, sir. I didn't talk to him in Haines City. I talking with him on another occasion. I was in jail at that time that he came.

Q. Did you tell him that Homeboy killed Walter Henderson?

A. No, sir. I never made any statement to him, not voluntary or any statement at all.

Q. Do your remember while you were in Haines City awaiting your mother's trial and talking to Deputy Ed Williams?

A. Well, I remember——

Q. In Bartow.

A. I remember talking to Mr. Williams on one occasion.

Q. Do you remember being in a cell and him being outside in the office and you having to talk through the cell?

A. I remember Mr. Williams talking to me.

Q. And do you remember telling Mr. Williams, on the first occasion when you spoke to him, that you were going to say that you don't know how to read, you don't know what was on the statement you signed?

A. No, I never made any statements like that to Mr. Williams whatsoever.

[417] MR. SANDSTROM: Would you specify the day, please?

MR. BLOCK: The date. I am establishing it by when he was in Bartow awaiting his mother's trial. I think you are more acquainted with that.

MR. SANDSTROM: That's why I would like for you to fix the time and place. You are just fixing it at any time in Bartow.

Q. (By Mr. Block) Was it in August of this year?

A. It could have been, sir.

Q. Now, George, do you remember the second time that you spoke to Ed Williams and you were reading a magazine or a newspaper?

A. No, sir. I can't remember talking to him. Just one

special time like I said he talked to me and that's all I can remember.

MR. SANDSTROM: I think this is way beyond the scope of direct. When we run to August 22nd, that is subsequent to the purported statement he made to the colored policeman. We are dealing with the predicate; that is the statements he made on June 11th. He is going to August 22nd.

THE COURT: I think it is relative to it.

Q. (By Mr. Block) Do you remember talking to Deputy Ed Williams when you were reading a magazine and Deputy Ed Williams saying to you, "George, how are you going to say you couldn't read what was on the confession? Now you [418] are reading the magazine or paper." Did he say that to you?

A. Deputy Williams never made that statement to me.

Q. Did you make this answer in response to that statement: Did you laugh a little bit and say, "Well, that's just what my lawyers told me to say"?

A. No, sir, I never made any statement like that, not to anyone.

Q. George, do you know how to write?

A. Well, yes, sir. I can write my name.

Q. Do you know how to write anything besides your name?

A. Well, yes, sir, I can try and write.

Q. Can you write a letter?

A. Yes, sir, I can write.

Q. Have you written to your wife, Dora, in Milwaukee?

MR. SANDSTROM: I think this is way off direct.

THE COURT: Sustained.

Q. (By Mr. Block) Have you written any letters?

MR. SANDSTROM: When?

THE COURT: One time or another perhaps.

Q. (By Mr. Block) You can write letters, can't you?

A. Well, I can write and I have wrote letters [419] like to someone.

Q. Were you doing any writing while you were up here in the County jail?

A. Yes, sir, I wrote.

Q. You did quite a bit of writing, didn't you?

A. Well, I wrote letters. I mean, if that is what you mean.

Q. Did you write down the story you were going to tell the Court?

A. No, sir, I never wrote down anything like that.

Q. Who is L. C. Holmes?

A. I don't recall the name.

Q. He was your houseman in your cell up here in the jail.

A. No, never was an L. C. Holmes, my houseman in the jail.

Q. Do you remember talking to a man in the jail who is a houseman and telling him that you were writing your story, that you had to have it ready to tell the Judge?

A. No, sir, I never had a houseman. As a matter of fact, the cell I am in, there is no houseman.

Q. It what?

A. The cell that I am in, it is not a houseman because it is a cell that has no water or anything like that. It's all by myself, the cell I am in now.

[420] Q. Do you remember walking around the cell and saying, "I'm practicing for court"?

A. No, I never did anything like that.

Q. Now, this room that you were in, that they turned on the heat, it got very hot, didn't it?

A. Yes, sir; so hot that you couldn't stand it after an hour and a half or so, a couple of hours.

Q. You said McClure and Holmes were there?

A. Yes, sir, they were there.

Q. But you couldn't stand the heat?

A. I couldn't stand the heat after a while.

Q. But they were there talking to you?

A. Well, they wasn't there together. One was there, then he would go out; like if Mr. Holmes be talking to me then Mr. McClure would go out and then after a while, Mr. McClure would come in and Mr. Holmes would go out. But I had to stay there because they force me to stay in the room all the time.

Q. They didn't buy you any hamburgers or coke that night?

A. I don't remember any hamburgers or coke or anything like that.

Q. They didn't bring you anything like that?

A. Nothing whatsoever.

Q. They didn't stop for an hour or an hour and a [421] half?

A. No, they was continually there.

Q. Are you able to read, George?

A. Well, some things. I am not a very educated man. I can read.

Q. I show you an instrument or petition of writ of habeas corpus under the number HC1969, and ask you if your signature appears on there.

A. Yes, sir, there is my name right there.

Q. Did you read that before you signed it?

MR. SANDSTROM: Before there is any testimony, I want to stipulate to let this thing in with regard to this case. I am glad to have it in. I wanted it, but I don't want them getting bits out of it.

THE COURT: Overruled.

THE WITNESS: This is my name right here (indicating).

Q. (By Mr. Block) Did you read it before you signed it?

A. Well, I looked at it, sir.

Q. Who asked you to sign it? Can you read this to the Court?

A. Whereabouts, sir?

A. Start from here (indicating).

A. To me—to——

Q. You didn't know what you were signing, did you?

[422] MR. SANDSTROM: I would like to know the time and place he signed it.

Q. (By Mr. Block) George, do you remember signing a statement?

A. Yes, sir.

Q. How many statements did you sign?

A. I remember the one Mr. Warren Holmes gave me. He gave me his pen to sign my name on it.

Q. Did you sign any statements before that?

A. Well, I remember that one. That's about all I remembers, sir.

MR. BLOCK: I have no further questions.

THE COURT: After you were placed in the City jail, how long was it before anybody came to question you?

THE WITNESS: Well, I would say that when I was taken there, the first that I remember was that when they really started—I would say, your Honor, the third or fourth day, I believe.

THE COURT: Third day before anybody questioned you; is that right?

THE WITNESS: The third day of June. Did you say when they taking me out?

THE COURT: I asked after you were put in the City jail, how long was it before anybody interrogated you?

THE WITNESS: Well, I was in there for two days. It [423] was on the third day.

THE COURT: On the third day when somebody interrogated you? Who was that?

THE WITNESS: Well, it was Mr. Shepherd, I believe, sir.

THE COURT: That was on the third day of June. Was there anybody else on that same day?

THE WITNESS: Well, it was Mr. McClure.

THE COURT: Mr. McClure on the third?

THE WITNESS: And some more police officers. I don't know their names.

THE COURT: How long did they examine you at that time, on the 3rd day of the month?

THE WITNESS: Well, at that time they talked to me for, I would say, about three hours, something like that.

THE COURT: Is that the day that the doctors came out there and gave you the shot in the arm?

THE WITNESS: Well, I believe it was either the same day, or the next day, sir.

THE COURT: Well, if it was the same day, would that be included in the three hours you are talking about?

THE WITNESS: I believe it was the next day.

THE COURT: You believe it was the next day, the 4th?

THE WITNESS: Yes, sir.

[424] THE COURT: They came and got you that day and took you to the doctor?

THE WITNESS: Mr. Warren Holmes, I believe, taken me down there, but I can't say.

THE COURT: Was he present when Dr. Davis gave you a shot in the arm?

THE WITNESS: I believe Mr. Warren was there, sir.

THE COURT: Now, when counsel asked you about having some wires put on, and you remembered, when was that? When was that done?

THE WITNESS: That was on the third day, I believe, sir.

THE COURT: On the third day. Then sodium amytal was given to you on the fourth day?

THE WITNESS: Yes, sir, to my remembrance.

THE COURT: How long did they interrogate you when the

sodium amytal was given to you on the fourth day?

THE WITNESS: Before then, I would say possibly maybe three or four hours.

THE COURT: Who questioned you on that occasion for three or four hours?

THE WITNESS: Well, I was told to just wait. I was waiting for someone. Mr. Warren Holmes and some other police officers— I don't remember their names, either—came up and said something to me, started asking me questions [425] regarding what I know about the case.

THE COURT: How long did that last?

THE WITNESS: That happened the only time I was waiting.

THE COURT: How long did it last? I didn't ask you when. I asked you how long it lasted.

THE WITNESS: Possibly an hour and a half, something like that.

THE COURT: An hour and a half. Now, then, that was the fourth day. When were you questioned again after the fourth day?

THE WITNESS: On the 11th that I remember correctly, sir.

THE COURT: You weren't questioned between the 4th and the 11th?

THE WITNESS: I could have been.

THE COURT: Not could have been. Were you or weren't you? You were there, you know about it. You are the only one that can tell us.

THE WITNESS: From the fourth day to the eleventh, I believe that I was questioned. I mean, I was trying to think. I believe that I was questioned some time during the time from the 4th to the 11th of June, but I just remember the 11th.

THE COURT: Well, do you know anybody that questioned [426] you between the 4th and the 11th, anyone of the detectives anybody else, anywhere, anytime, between the 4th and the 11th? You tell me if anybody did that and, if so, when and for how long a time.

THE WITNESS: I will try and remember the best I can. During the time I remember being questioned, but I was questioned lots of times. I just can't say directly how long each time because——

THE COURT: Just tell me one time betwen the 4th of June and the 11th of June on which you were questioned. Just one time, and by whom.

THE WITNESS: Detective Shepherd, I believe, sir.

THE COURT: What day did he question you, if you remember?

THE WITNESS: I don't remember what day.

THE COURT: For how long a period of time?

THE WITNESS: Maybe an hour, hour and a half.

THE COURT: Maybe an hour or an hour and a half. Is that the only time you remember between the 4th and the 11th?

THE WITNESS: That I remember, sir.

THE COURT: All right, then. Now, did you say you told them how the accident happened, or the occurrence, whatever you want to call it, on the morning of June 1st?

THE WITNESS: I told Mr. Warren Holmes that I had——

[427] THE COURT: Did you tell him how it happened?

THE WITNESS: Did I tell Mr. Warren Holmes how it happened?

THE COURT: Yes.

THE WITNESS: He asked me.

THE COURT: Did you tell him how it happened, how you said it happened?

THE WITNESS: I explained it to him the best that I could.

THE COURT: What did you tell him?

THE WITNESS: I tell him about what, sir?

THE COURT: About how the occurrence happened that we are here about—on the morning of June 1st, about what time it was, what you were doing there and so forth.

THE WITNESS: Well, I tried——

THE COURT: I am asking what you told him about how it happened, that you claim is the truth about how it happened.

THE WITNESS: Well, actually, the truth about how it happened, I will tell you exactly what I told him.

THE COURT: All right.

THE WITNESS: What happened is it went back to the same—it went back to that Saturday I got home from work, and I brought a new car, and my wife and I went out joyriding. We went over to Opa-locka, Florida, and we just rode around [428] for a while. After that we went to the picture show, and after that, well, we was on our way home.

On our way home, coming down 7th Street, I went by the stop light at the 5th Street bridge. Before I knew it, then I stopped. I live right across the 5th Street bridge in the colored section. So after I passed the light and the bridge, well, then, I went on ahead and I was looking for the first

place to turn around to go back to the bridge, then go back across the bridge and on home. I live right across there, in the colored section.

After I went past there, then I was looking for the first place to turn around to go back. The first place I came to was a—it looked like a parking lot of some kind, so I pulled in there to turn around. After I pulled in there to turn around, I heard a noise like when you run over a sidewalk or something.

After that, being jousted up, I struck my head on something, and the lights went out. The next thing I remember, the water was pouring in. I started to feeling myself being turned around in the water as I start coming to. Then I feeling the water and everything coming in. Well, the first thing I tried to do was to try and open the door, something like that.

By that time, the water started pouring in more, and more, and more. When I came back to the top of the [429] water then I started yelling for help. Then I was looking around for something to catch ahold to, and then I seen the bank over there. Then I managed to get over to the bank. I was trying to yell and get help.

Then, when I got up there, I climbed up on the bank, and then I heard a yell. So I was yelling for help. Just as I climbed up on the bank, my feet went out from under me and I fell back into the water on top of a boat. Finally, after rolling off the boat, tumble, what have you, I was back in the water. Then I just caught ahold to the boat just before I went under the water again.

I was pretty near gone at that time. Before I went under the water, I managed to catch ahold to the boat that was standing there. It seemed to be a little small boat and my left side at that time seemed to be in pain, and I just caught ahold there and just hung on and just yelled at the top of my voice for help. After yelling and yelling and yelling, then, finally, some men came by. I was yelling.

So they came in and one of the men stepped on top of the—stepped down in there on top of a boat and lifted me back up on the bank. He had to call his partner to help him to get me up on the bank. I was glad of that.

They laid me on the bank and by that time the police came.

THE COURT: Could you talk?

[430] THE WITNESS: How is that, sir?

THE COURT: Could you talk at that time?

THE WITNESS: Well, I was yelling something. I was—I was yelling something.

THE COURT: Do you remember what happened?

THE WITNESS: I remember.

THE COURT: Did you ever tell him about your wife being in the car?

THE WITNESS: I was yelling that my wife was in there, to get my car up.

THE COURT: No further questions.

MR. BLOCK: The State has no questions.

MR. SANDSTROM: You can come down.

(Witness excused.)

[452] WILLIAM F. McCLURE

was recalled as a witness on behalf of the State, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By MR. BLOCK:

[471] Q. I note in that tape that you made a statement to George that there would be no mention of the fact that "we had to keep you a long time to get you to tell us about this."

A. This was going along with his proposal that his confession appear to be spontaneous. He didn't want it to appear as though we had to question him in order to get it. A long period, by my definition, would be the time we interrogated him, which would be, probably, the two hour period, at the most.

[472] Q. Then you didn't consider it a long period of time, this interrogation of him on the 5th or the interrogation of him that you observed Shepherd with him on the 6th of June?

A. I wouldn't consider the cumulative effect—I wouldn't add them all together in order to determine what would be considered a long period of time for one interrogation.

Q. He never gave a statement until the 11th of June; isn't that true?

A. He gave statements.

Q. Well, I mean, with regard to the subject matter, the case that we are here today upon?

A. No, that was the first time.

Q. And there was truth serum administered to him during the interim?

A. I found out on the same day the tape was taken that had been done.

Q. Did you find out what date they administered the truth serum to him?

A. I don't know the exact date. I think it was during the first several days. I don't know.

Q. First several days. Can you say the date?

A. No, I can't.

Q. You said the 3rd of June. Would that appear correct to you?

[473] A. It would be in the right period. I still—I just don't know.

Q. And then were you also aware that he had also administered to him one of these lie detector tests?

A. I understand that there had been one administered. I wasn't there.

Q. You became aware of that on the 11th?

A. Yes.

Q. Did you determine a lie detector test had been administered? That is, when it had been administered?

A. No.

Q. If I said the 4th day of June, would that be correct?

A. I don't know from the beginning when he took that test.

Q. And didn't you tell George that this is going to help him, "This is going to help you to make this statement, just like I kept telling you all along"? Didn't you make that statement?

A. I think I said that. I think I heard that on the tape. I was referring to his—"help you with God," I think that was——

Q. Didn't you say, first of all, "It will help you with God," you just didn't limit it to that?

A. Well, I don't recall.

[474] Q. Didn't you state in there, "This is going to help you just like I have been telling you all along"? Didn't you mention it?

MR. BLOCK: The jury has heard that and knows what the conversation was.

THE COURT: I think so.

Q. (By Mr. Sandstrom) You said you kept telling him that all along. How many times had you told him that?

A. I don't believe I told him that before at all. Well, I know I didn't tell him that before at all. This was after he had already made the confession.

Q. I see. Now, didn't you also tell him that it will be valuable for him to cooperate, that would be his only fair chance?

This was after the confession was already made.

Q. Well, you didn't mean before the statement was taken?

A. Before the typewritten copy, yes.

Q. And didn't you also tell him that, "I believe you better go one step further and put this down on paper, that you called us in voluntarily and told us this whole thing"?

A. Yes, I said that. This was going along with his first proposal that he wanted it to appear as though it was a spontaneous thing. I carried it right on since he [475a] suggested it.

Q. That is how you commenced the particular statement?

A. Correct.

Q. That was your suggestion at that time, though, wasn't it?

A. This was following along with his original suggestion, yes.

Q. Did you tell him that his only chance of not going to the chair was to tell you?

A. I don't believe I told him that, in those words.

Q. What words did you use?

MR. BLOCK: We are back to what they have already heard again.

THE COURT: The tape recording speaks for itself. You can ask him if he has an independent recollection. I think the record is the best evidence.

MR. SANDSTROM: I want to establish by the witness that his words——

THE COURT: I will permit you to ask him that.

Q. (By Mr. Sandstrom) Didn't you tell him that?

A. That was my voice that said that on the tape recording.

Q. That said those words on the tape?

[475] A. Yes.

Q. One other thing. What time did you have him examined by that doctor?

A. The stenographer had already taken his statement. Then we took him to the doctor shortly after midnight—five minutes after twelve.

Q. What time did you arrive back when he did this erasing?

A. A half-hour later, after the doctor completed his examination.

Q. Towards one o'clock?

A. Yes.

Q. This period extended from 6:30 until about one?

A. Yes, that's right. He was out with us during that period of time, yes. That wasn't all interrogation, though.

Q. When you went to take him out to the doctor, did you say something to the effect that you were going to take him for a little ride?

A. No.

Q. Did George appear to be in any fear at that time to you?

A. No.

Q. Did he appear to be afraid that you were angry [476] with him?

A. No, not at all.

Q. Did he appear to be afraid that Mr. Holmes was angry with him?

A. No.

Q. He did keep asking if you were angry?

A. He seemed more concerned with pleasing us than anything else at the moment.

Q. Sure. By the way, on these statements, when you take this written statement, do you usually have erasures on each page?

A. No, this was a rush job. She was going a little too fast. She hit the wrong keys several times. I think you can see that they are not long erasures. Most of them are mistyped words and they were erased.

Q. Isn't it a practice of yours that you have a man initial any changes?

A. Anywhere there is an erasure, we have him initial it.

Q. About how many statements have you taken, Detective McClure?

A. From defendants interrogated in this fashion, that would be difficult to say.

Q. Well, an approximation would be sufficient.

MR. KOGEN: Can I hear that question again?

[477] THE COURT: He wants to know how many statements he has taken.

MR. KOGEN: On this case?

THE COURT: No. On all cases.

THE WITNESS: Over a hundred, in excess of a hundred.

Q. (By Mr. Sandstrom) How long have you been with the Miami Police Department?

A. Eleven years.

Q. During that time, how long have you been with the Detective Division?

A. Over six years.

Q. And about how many statements did you take a week?

A. Well, that is variable, maybe four or five a week.

Q. Now, up until the time that George made this statement, you say he was in custody for investigation of manslaughter?

A. That was reflected by the report.

Q. The only time this was a murder charge was after his statement?

A. As far as I know it was after the statement.

Q. How many times have you had occasion to take typewritten statements?

A. That's what I had reference to. In excess of [478] a hundred, I'd say.

Q. That was written statements you referred to?

A. Yes.

Q. About how many times do you interrogate persons?

A. All week long. I suppose at least once a day, I'd say.

Q. For about the last seven years?

A. Yes.

SUPREME COURT OF THE UNITED STATES

No. 5712 ------, October Term, 1970

GEORGE WILLIAM MILTON,

Petitioner,

v.

LOUIE L. WAINWRIGHT, *Director, Florida Division of Corrections*

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth ----- Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 7, 1971

U. S. Government Printing Office: 1971—448-349/273

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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No. 70-5012

GEORGE WILLIAM MILTON,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	4
STATEMENT	4
A. History of case	4
B. Statement of the facts	8
SUMMARY OF ARGUMENT	15
ARGUMENT	18
QUESTION I	18
A. This Case Is Not Distinguishable From Massiah v. United States, 377 U.S. 201 (1964), On Its Facts	18
B. The Massiah Holding Fully Applies To State Criminal Cases	23
C. The Massiah Holding Should Not Be Given Limited Prospective Effect Only; As With Gideon v. Wainwright, 372 U.S. 335 (1963), And Other Right-To-Counsel Cases Preceding Massiah, It Should Be Accorded Normal Application	26
QUESTION II	35
A. Upon An Independent Review Of The Totality Of Circumstances Preceding Its Extraction, Petitioner's Confession To Officer Langford Was Clearly An Involuntary Confession And Its Admission Into Evidence Was A Violation of Petitioner's 14th and 5th Amendment Rights	35
(1) Violation of 4th Amendment rights	35
(2) Violation of Clear State Statutes	36
(3) Violation of 5th Amendment rights	36
(4) Violation of 6th Amendment rights	40
(5) Summary	41
CONCLUSION	41

CITATIONS

Cases:

	Page
Adamson v. California, 332 U.S. 46 (1947)	27
Arsenault v. Massachusetts, 393 U.S. 5 (1968)	29, 31
Ashcraft v. Tennessee, 322 U.S. 143 (1944)	37
Ashe v. Swenson, 397 U.S. 436 (1970)	29
Benton v. Maryland, 395 U.S. 784 (1969)	25
Berger v. California, 393 U.S. 314 (1969)	29
Betts v. Brady, 316 U.S. 455 (1942)	28, 30, 31
Bloom v. Illinois, 391 U.S. 194 (1968)	28
Bute v. Illinois, 333 U.S. 640 (1948)	24, 29
Chambers v. Florida, 309 U.S. 227 (1940)	37
Chandler v. Fretag, 348 U.S. 3 (1954)	15, 24, 30, 40
Chimel v. California, 395 U.S. 752 (1969)	27
Citenia v. Lagay, 357 U.S. 504 (1958)	27
Clewis v. Texas, 386 U.S. 707 (1967)	37
Colombe v. Connecticut, 367 U.S. 568 (1961)	37
Crooker v. California, 357 U.S. 433 (1958)	27
Davis v. Mississippi, 394 U.S. 721 (1969)	35
Davis v. North Carolina, 384 U.S. 737 (1966)	35, 38
DeStefano v. Woods, 392 U.S. 631 (1968)	28
Desist v. United States, 394 U.S. 244 (1969)	27
Doughty v. Maxwell, 376 U.S. 202 (1964)	24
Douglas v. California, 372 U.S. 353 (1963)	24, 29, 30
Duncan v. Louisiana, 391 U.S. 145 (1968)	28
Escobedo v. Illinois, 378 U.S. 478 (1964)	24, 27, 31
Ferguson v. Georgia, 365 U.S. 570 (1961)	24, 40
Fikes v. Alabama, 352 U.S. 191 (1957)	38
Fuller v. Alaska, 393 U.S. 80 (1968)	27
Gideon v. Wainwright, 372 U.S. 335 (1963)	15, 24, 26, 29, 30, 31, 33
Gilbert v. California, 388 U.S. 263 (1967)	24, 28, 31, 33

	Page
Goldman v. United States, 316 U.S. 129 (1942)	27
Griffin v. California, 380 U.S. 609 (1965)	27
Griffin v. Illinois, 351 U.S. 12 (1956)	29
Grosso v. United States, 390 U.S. 62 (1968)	27
Haley v. Ohio, 332 U.S. 596 (1948)	37
Hamilton v. Alabama, 368 U.S. 52 (1961)	24, 30, 31
Harris v. United States, 331 U.S. 145 (1947)	27
Haynes v. Washington, 373 U.S. 503 (1963)	37
Hill v. California, 401 U.S. 797 (1971)	27
Jackson v. Denno, 378 U.S. 368 (1964)	29
Jacobs v. State, 248 So.2d 515 (Fla. App., 1st Dist., 1971)	9
Jenkins v. Delaware, 395 U.S. 213 (1969)	27, 31
Johnson v. New Jersey, 384 U.S. 719 (1966)	27, 31, 33, 35
Kaiser v. New York, 394 U.S. 280 (1969)	27
Katz v. United States, 389 U.S. 347 (1967)	27
Lee v. Florida, 392 U.S. 378 (1968)	27
Lee v. United States, 322 F.2d 770 (5 Cir. 1963)	30
Lewis v. United States, 348 U.S. 419 (1955)	27
Leyra v. Denno, 347 U.S. 556 (1954)	18, 39
Linkletter v. Walker, 381 U.S. 618 (1965)	26, 27
Lisenba v. California, 314 U.S. 219 (1941)	37
Lyles v. Beto, 329 F.2d 322 (5 Cir. 1964), vacated and remanded, 379 U.S. 648 (1965), opinion on remand, 363 F.2d 503 (1966)	30
Mackey v. United States, 401 U.S. 667 (1971)	27
Malinski v. New York, 324 U.S. 401 (1945)	37
Malloy v. Hogan, 378 U.S. 1 (1964)	18, 27, 37
Mapp v. Ohio, 367 U.S. 643 (1961)	26, 33
Marchetti v. United States, 390 U.S. 39 (1968)	27
Massiah v. United States, 377 U.S. 201 (1964)	passim
Maxwell v. Dow, 176 U.S. 581 (1900)	28

Page

McConnell v. Rhay, 393 U.S. 2 (1968) 29, 31

McLeod v. Ohio, 381 U.S. 356 (1965) 15, 25, 31

Mempa v. Rhay, 389 U.S. 128 (1967) 24

Milton v. Cochran, 147 So.2d 137 (Fla. 1962), cert. den., 375 U.S. 869 (1963) 5, 9, 36

Milton v. State, 121 So.2d 496 (Fla. App., 3rd Dist., 1960) 5

Milton v. State, 125 So.2d 880 (Fla. 1960) 5

Milton v. State, 181 So.2d 751 (Fla. App., 3rd Dist., 1966) 5

Milton v. State, 188 So.2d 312 (Fla. 1966) 5-6

Milton v. Wainwright, 396 F.2d 214 (5 Cir. 1968) 6, 7

Milton v. Wainwright, 306 F.Supp. 929 (S.D. Fla. 1969) 1, 7

Milton v. Wainwright, 428 F.2d 463 (5 Cir. 1970) 1, 7

Miranda v. Arizona, 384 U.S. 436 (1966) 24, 27, 31

Moore v. Michigan, 355 U.S. 155 (1957) 24, 30

Olmstead v. United States, 277 U.S. 438 (1928) 27

On Lee v. United States, 343 U.S. 747 (1952) 27

Palko v. Connecticut, 302 U.S. 319 (1937) 28

Payne v. Arkansas, 356 U.S. 560 (1958) 36

People v. Flores, 236 Cal. App.2d 807, 46 Cal. Rptr. 412 (1965) 15, 20, 21, 31, 32

Powell v. Alabama, 287 U.S. 45 (1932) 7, 15, 16, 24, 30, 36

Procunier v. Atchley, 401 U.S. 966 (1971) 20

Roberts v. Russell, 392 U.S. 293 (1968) 29

Schwartz v. Texas, 344 U.S. 199 (1952) 27

Snyder v. Massachusetts, 291 U.S. 97 (1934) 28

Spano v. New York, 360 U.S. 315 (1959) 16, 18, 24, 30, 40

Stovall v. Denno, 389 U.S. 293 (1967) 28, 31

Tehan v. Shott, 382 U.S. 406 (1966) 27

Townsend v. Burke, 334 U.S. 736 (1948) 15, 24, 29

Page

Twining v. New Jersey, 211 U.S. 78 (1908) 27

United States v. Kahriger, 345 U.S. 22 (1953) 27

United States v. Rabinowitz, 339 U.S. 56 (1950) 27

United States v. United States Coin and Currency, 401 U.S. 715 (1971) 29

United States v. Wade, 388 U.S. 218 (1967) . . . 24, 28, 30, 33

Watts v. Indiana, 338 U.S. 49 (1949) 33, 37

White v. Maryland, 373 U.S. 59 (1963) 24, 30, 31

Williams v. United States, 401 U.S. 646 (1971) 27

Witherspoon v. Illinois, 391 U.S. 510 (1968) 29

Wolf v. Colorado, 338 U.S. 25 (1949) 27

Wong Sun v. United States, 371 U.S. 471 (1963) 35

Constitutional Provisions:

Fourth Amendment, U.S. Constitution 2, 10, 16, 18, 33, 35, 41

Fifth Amendment, U.S. Constitution . . . 2, 4, 10, 16, 18, 20, 28, 29, 33, 35, 40, 41

Sixth Amendment, U.S. Constitution . . 2, 15, 18, 19, 20, 23, 25, 26, 28, 34, 40, 41

Fourteenth Amendment, U.S. Constitution . . 3, 4, 15, 18, 23, 25, 28, 29, 35, 38, 39, 40, 41

Statutes:

28 U.S.C. 1254 (1) 2

Section 901.23, Fla. Stats. 1957, Laws 1939, c. 19554, Sec. 23 (Sec. 901.23, Fla. Stats. Anno.) 3, 25, 36

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Page

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1946 Op. Atty. Gen. (Fla.) 738 36

IN THE

Supreme Court of the United States

No. 70-5012

GEORGE WILLIAM MILTON,

Petitioner,

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LOUIE L. WAINWRIGHT,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit (A. 34-36; R. Vol. II, Doc. #3) is reported at 428 F.2d 463. The opinion of the U.S. District Court for the Southern District of Florida, Miami Division (A. 25-32; R. 142-150) is reported at 306 F. Supp. 929.[1]

[1] The numerous prior decisions involving this case will be referred to in the Statement, History of the Case, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1970 (A. 37; R. Vol. II, Doc. #4), and Petitioner's timely petition for rehearing was denied July 16, 1970 (A. 38; R. Vol. II, Doc. #5). The petition for a writ of certiorari was filed August 13, 1970, and was granted on June 7, 1971, 403 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1, Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 901.23, Florida Statutes Annotated (Sec. 901.23, Florida Statutes 1957; Laws 1939, c. 19554, Sec. 23):

"An officer who has arrested a person without a warrant shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

Section 901.24, Florida Statutes Annotated (Sec. 901.24, Florida Statutes 1957; Laws 1939, c. 19554, Sec. 24):

"Any attorney at law entitled to practice in the courts of this state shall, at the request of the person arrested or of some one acting in his behalf, be permitted, forthwith upon his request, to visit the person arrested and to interview him privately."

QUESTIONS PRESENTED

1. Are the Sixth Amendment right-to-counsel protections as construed in *Massiah v. United States*, 377 U.S. 201 (1964), proscribing confessions extracted by design from an accused in the absence of his counsel after indictment, to be given only limited, prospective application, or do they apply through the 14th Amendment to a 1958 State capital case?

2. Where the State contrives, after an indictment for first degree murder, to interrogate the accused in the absence of his counsel by placing a police officer in his cell disguised and posing as another prisoner, and where the officer then prods, probes and questions the accused, using psychological techniques to make him talk, and overcomes after 12 to 18 hours the accused's repeatedly expressed wish not to talk about his case, is the resulting confession, when considered in the light of the totality of the circumstances preceding it, a free and voluntary confession under the 14th and 5th Amendments to the United States Constitution?

STATEMENT

A. History of the Case.[2]

On November 24-26, 1958, Petitioner was tried by jury and convicted of first degree murder, with recommendation of mercy, in the Florida Circuit Court, Eleventh Judicial Circuit, Dade County, Miami, Florida (T. 650-653). He was sentenced to life imprisonment on December 12, 1958 (R. 2).

[2]References to the printed Appendix will be made by the letter A (e.g., A. 15); to the original Record in this Court by the letter R (e.g., R. 15); and to the pages of the original Florida trial court transcript, which is an exhibit in this Record (R. 156), by the letter T (e.g., T. 15).

Petitioner's appeal to the Florida District Court of Appeal, Third District, of his original conviction was dismissed without review on the merits, *Milton v. State*, 121 So. 2d 496 (Fla. App., 3rd Dist., 1960), apparently because Petitioner escaped during the pendency thereof. See *Milton v. Cochran*, 147 So.2d 137 (Fla. 1962) at p. 137. Petitioner was quickly returned to custody, filed a petition for writ of certiorari with the Florida Supreme Court; and this too was denied without opinion or review on the merits. *Milton v. State*, 125 So.2d 880 (Fla. 1960).

Thereafter Petitioner brought a series of collateral attacks on his judgment of conviction. Apparently he first filed a habeas corpus petition with the Florida Supreme Court. That Court issued the writ, heard oral argument, and then discharged the writ in an opinion reported as *Milton v. Cochran*, 147 So.2d 137 (Fla. 1962), cert. den., 375 U.S. 869 (1963).[3]

During Petitioner's trial the State contended that Petitioner had voluntarily confessed the alleged murder on five separate occasions. All five alleged confessions were admitted into evidence against him. *Milton v. Cochran, supra*, involved an attack on the voluntariness of the first four confessions.

In 1965 Petitioner filed a motion under Florida Criminal Procedure Rule 1 (now Fla. Cr. P. Rule 1.850, 33 Fla. Stats. Anno., Rule 1.850, p. 452) seeking to vacate his judgment of conviction and sentence (R. 4). This was denied by the original trial Judge on July 12, 1965 (R. 4). Appeal from this denial was dismissed without opinion on January 13, 1966. *Milton v. State*, 181 So.2d 751 (Fla. App., 3rd Dist., 1966). A second petition for habeas corpus to the Florida Supreme Court was denied without a hearing or opinion on March 3, 1966. *Milton v. State*, 188

[3]The fact that Petitioner had escaped for a time during his appeal was deemed not to preclude his collateral attack. 147 So.2d at 138. Mr. Justice Douglas dissented from the denial of certiorari in the *Cochran* case. 375 U.S. 869.

So.2d 312 (Fla. 1966). The grounds of these attacks do not clearly appear in this Record and are not reflected in the reported decisions, but it appears from the petition in this case that the grounds concerned the admissability of the fifth confession, rather than the first four, as being coerced and involuntary (A. 7-9; R. 5; see 396 F.2d at 215). Petitioner was not represented by counsel in these proceedings (A. 9-10; R. 6).

Petitioner next filed a petition for writ of habeas corpus on February 24, 1967, with the U.S. District Court for the Middle District of Florida, which was transferred to the U.S. District Court, Southern District of Florida (R. 74, 10). This petition, which clearly attacked the fifth confession and the way it was obtained, was denied without holding an evidentiary hearing but upon review of the State trial record, in an unreported opinion dated September 15, 1967, and filed September 19, 1967 (A. 14-19; R. 75-86, 10). The District Court held that the methods used by the State in obtaining the fifth confession "comported fully with the requirements of due process" (A. 19; R. 86).

On appeal the Court of Appeals for the Fifth Circuit expressed "grave doubts" as to the Constitutional validity of the methods used by the State but affirmed on June 5, 1968, in an opinion stating that the affirmance was not for the reasons given by the District Court below and was not a ruling on the intrinsic merits of Petitioner's claims (A. 12, 11-13; R. 17, 14-18). Instead, the Court of Appeals affirmed because Petitioner had not presented the particular factual contentions currently raised to the Florida Sentencing Court and had thus not exhausted an available State post-conviction remedy. *Milton v. Wainwright*, 396 F.2d 214 (5 Cir. 1968). The affirmance was without prejudice to Petitioner's reapplying for relief in the Florida Sentencing Court. 396 F.2d at 215 (A. 13).

Petitioner promptly filed the suggested Florida Rule 1 motion with the Florida Sentencing Court on July 25, 1968 (R. 11). The motion was denied without a hearing

or opinion on September 3, 1968 (R. 20). In a further effort to exhaust all State remedies Petitioner then filed a habeas corpus petition on May 8, 1969, with the Florida Supreme Court, but that petition was returned by the Chief Justice by letter dated May 15, 1969, refusing to docket the petition (R. 22, 11).

This present federal habeas corpus case was then commenced in the U.S. District Court, Southern District, Florida, on June 11, 1969. The District Court ordered an evidentiary hearing and appointed counsel for Petitioner (R. 56-58).[4] At the hearing, however, counsel for Petitioner and State stipulated (A. 19-24; R. 97-107) that no additional evidence was needed and that the case could be determined on the basis of the facts stated in the U.S. Court of Appeals' prior opinion, 396 F.2d 214 (which appears at A. 11-13; R. 14-18), and on the facts appearing in the original State trial transcript, which was made an exhibit (A. 33; R. 156). Accordingly, no fresh evidence was taken in the District Court below and the hearing was confined to a recitation of the case's history (R. 72-98), counsels' stipulation (A. 19-24; R. 97-107), and oral argument (R. 107-139).

On November 6, 1969, the District Court rendered its decision (A. 25-32; R. 142-150) denying the petition on the basis that the State court transcript showed Petitioner's fifth confession to be "freely and voluntarily given" albeit obtained by methods proscribed by the Sixth Amendment as determined in *Massiah v. United States*, 377 U.S. 201 (1964). The Court declined to apply *Massiah* "retroactively" to this 1958 conviction and construed *Powell v. Alabama*, 287 U.S. 45 (1932), an earlier right-to-counsel case, as inapposite (A. 30-31; R. 148-150). 306 F.Supp. 929. The U.S. Court of Appeals affirmed per curiam on June 23, 1970 (A. 34-36; R. Vol. II, Doc. #3), 428 F.2d 463.

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[4]Petitioner objected to court-appointed counsel and sought to have the evidentiary hearing held in the State Court (R. 59-65). These contentions were denied (R. 66-67).

B. Statement of the Facts

Petitioner in 1958 was a 23 year old Negro (A. 55; T. 322, 104, 609) who worked as a porter in a Miami Beach hotel (A. 89; T. 380), had ambitions to be a boxer (T. 308, 424; R. 142), and was living in a rooming house in the "Negro area" of Miami (T. 481, 69, 200, 294-295) with a pregnant woman (T. 304, 79) he regarded as his wife (T. 313, 304, 480, 483). He had never before been jailed or interrogated by the police (A. 133, 55; T. 464, 322, 492). He was from Mississippi where he had dropped out of school during the sixth grade (A. 134; T. 466).

In the early morning hours of June 1, 1958, Petitioner while operating a used car he had purchased a few hours earlier for $99.00, went into the Miami River (T. 217-222, 480-483, 91-120, 157-158). The only other person in the car was his wife; she was killed by drowning (T. 76-84, 157-162). Petitioner was hauled from the river by a nearby boat captain (T. 91-120). He was hurt and incoherent (T. 103, 480-483, 592, 492-493).

Officer McGraw of the Miami Police Department questioned Petitioner briefly at the scene (T. 145-155). Petitioner was then taken to the hospital in an ambulance (T. 153, 123, 149), where he was again questioned by Detective Shepherd of the Miami Police Department and Officer McGraw while lying on a stretcher in the colored side of the emergency room (T. 124-130, 125, 129, 149). The following day, June 2, 1958, Petitioner was taken from the hospital, with his shoulder in a sling (T. 492), and placed in the City Jail in a solitary 4-by-6 foot cell without windows and with a solid metal door (A. 122-123; T. 444-446).

For the next 17 days (June 2 - June 19, 1958) the police held Petitioner incommunicado in this isolated cell and in the County Jail without benefit of counsel, without advising him of any charge against him, and without taking him before a magistrate (A. 122-134, 57; T. 444-448, 431, 465, 325). Petitioner tried to call "my wife's folks" and his family but was not allowed to make telephone calls (A. 133-

134, 57; T. 465, 325). He received no visitors (A. 134; T. 465). See *Milton v. Cochran*, 147 So.2d 137, 138 (Fla. 1962), where the Florida Supreme Court reviewed this trial record and warned that if the procedures followed in this case were not halted, a *McNabb* type of rule would have to be adopted or imposed.[5]

During this period from June 1 to June 19, 1958, Petitioner's only contact was with the police. On June 3, 1958, he was taken from his cell at 6:30 a.m., brought to an interrogation room, shot in the arm with truth serum, and questioned by a Ph.D. psychologist and an M.D. psychiatrist with Detective Holmes of the Miami Police Department present (A. 112; T. 426-428, 556-559, 448-449, 476-477, 339, 365-366). The record does not reflect what Petitioner then said except that he apparently did not confess to murder (A. 112; T. 427-428). Detective Holmes testified he always "on any occasion" warned Petitioner about his Constitutional rights (A. 115, 110; T. 432, 423) and that Petitioner "desired" the truth serum to be administered (A. 112; T. 427). Petitioner later claimed in July, 1958, that he had been "forced" or "made" to take the serum (A. 80-81; T. 365-366, 346), and warned his cell-mate, a disguised policeman, not to take it (A. 65, 44; T. 339, 302).[6]

The following day, June 4, 1958, Petitioner was again removed from his cell by Detective Holmes, hooked up to "wires or gadgets" (A. 125; T. 449-450), and given a polygraph test (A. 144; T. 431). The record does not disclose what was then said except that again apparently no incriminating statements were made (A. 114; T. 431). Petitioner proffered proof, rejected by the Court, that this interrogation was involuntary (T. 558-559).

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[5]On May 25, 1971, the Florida District Court of Appeal, First District, noted that the warning in *Milton v. Cochran, supra*, had gone unheeded and adopted a *McNabb-Mallory* type of rule in *Jacobs v. State*, 248 So.2d 515 (Fla. App., 1st Dist., 1971).

[6]Petitioner described the truth serum procedure to his cell-mate as, "* * * they gave you a shot into your arm, or something. You lay down on the couch and you talk out of your head." (Officer Langford's testimony, A. 65; T. 339).

On June 5, 1958, Petitioner was further interrogated by Detective Shepherd and "consented" to the police searching his rooming house quarters (A. 98-99; T. 396-397). At this session, Detective Shepherd testified he warned Petitioner about his Fifth Amendment rights but not about his right to counsel, and apparently not about his Fourth Amendment rights (T. 403-404).

During the following days Petitioner was interrogated on various occasions (A. 98-100, 111-113; T. 398-399, 450, 486-488) he says almost daily and for long periods (A. 123-125, 139-142; T. 446-447, 478). Finally, on June 11, 1958, Petitioner was taken from his City Jail cell to an interrogation room which was equipped with recording devices (A. 92-95, 111; T. 506-507, 391, 386-391, 425) and a secret observation station behind a one-way mirror (T. 552, 386). There he was questioned by two detectives who worked in tandem, that is, one would question while the other was absent and *vice versa* and then the two would question together, etc. (A. 109-111, 125-131, 92-97; T. 473, 386, 390-391, 397-398, 506, 565, 425). The interrogation began about 5 p.m. (A. 109; T. 422-423, 550) and was not completed until the next morning about 1 a.m. (A. 147; T. 529, 583, 587).

The State's version is that the questioning was gentle, Petitioner was cooperative, and that about 9:30 p.m. (A. 95; T. 390) Petitioner—after being told his story was "baloney" (A. 115, 126; T. 566-568, 432-433, 452)—readily confessed to killing his wife deliberately (A. 92-96; 109-111, 115, 117-120; T. 385-393, 422-426, 432-433, 435, 518-534; 550-572). At this point, the State's evidence continues, Petitioner proposed "a sort of a little act"—a charade—to make his confession *appear* "voluntary" and "spontaneous" (A. 95-96, 119; T. 507-508, 524, 390-393, 404-405, 438-440). Petitioner was to step out of the room, knock on the door, say "hello" when it was opened, and tell the detectives he wanted to confess (A. 95-96, 119; T. 390-393, 507-508). The detectives testified they saw no reason not to accommodate Petitioner in this charade and in fact followed this

unprecedented procedure (A. 103, 119-120; T. 404-405, 438-439, 507-508).

The tape recording device in the interrogation room was manually operated and could be turned on and off from behind the one-way mirror (A. 111; T. 391, 425, 506-507). There was an apparent shortage of tape so the entire interrogation from its beginning was not recorded (A. 95; T. 391, 414, 506-507, 520), but the tape was turned on by the hidden detective behind the one-way mirror when Petitioner agreed to confess prior to the door-knocking charade and during the confession that followed (A. 95; T. 391, 507-508). This was the first confession and the tape recording was admitted into evidence and played to the jury over Petitioner's objection (T. 510-511, 581). The tape lasted one hour and three minutes (A. 108-109; T. 571, 414, 521) out of the eight hours that elapsed from the beginning of Petitioner's interrogation until its end.

Thereafter, a stenographer was summoned and a second confession was dictated (A. 96-97; T. 571-572, 393-394, 513, 521, 554). This also was admitted into evidence before the jury over Petitioner's objection (T. 588-594).

Petitioner was next stripped to the waist and photographed (A. 96; T. 394, 513-514). By this time, one of the detectives testified, Petitioner "seemed more concerned with pleasing us than anything else at the moment" (A. 147; T. 530), so the two detectives took their congenial prisoner to the hospital for examination by the Chief County Medical Examiner to show he had no bruises or marks of violence on his body (A. 97, 131; T. 394, 415-422, 583-588). The Medical Examiner, who had previously joined in the search of Petitioner's rooms (A. 98; T. 396), testified it was most unusual to be asked to examine a prisoner at midnight as he was asked to examine Petitioner (T. 419). Petitioner was then returned to the police office where he initialed and signed the dictated second confession in written form (A. 97, 132; T. 394, 514-516, 554-555).

Petitioner's evidence is that he was abused (A. 125-132; T. 458); threatened with being taken for "a ride out in the country" (A. 127; T. 453-460); threatened that "you are going to stay here a thousand years" (A. 126-127; T. 453); and subjected to a third-degree "heat" treatment (A. 129-130; T. 458-459, 473) until he finally agreed to do whatever the detectives asked him to do and "confessed" (A. 126-131; T. 451-466). As Petitioner described it, "Then, finally, well, they wasn't anything else I could do." (A. 130; T. 458).

There is no testimony from Petitioner concerning the next day, June 12, 1958. The State's evidence is that Petitioner requested to see a detective to change his confession of the prior evening (T. 534-535, 545). The detective agreed to allow this but asked that Petitioner first re-enact the fatal events of June 1, 1958 for him at the scene (T. 535, 546). Petitioner agreed, did so, and was photographed while so performing the re-enactment (T. 535-541, 546). The detective testified to this over Petitioner's objection before the jury (T. 535-541, 534), and this is the third confession.

Next Petitioner was taken from the scene of re-enactment to the police office where a fourth confession was dictated, transcribed and signed by Petitioner (T. 541-544). This fourth confession largely reaffirmed the second (T. 595-605). It was also admitted into evidence before the jury over Petitioner's objection (T. 588, 595-605).

Thereupon, having held Petitioner incommunicado since June 1, 1958, without benefit of counsel, and armed with four confessions, the police for the first time on June 13, 1958, made a formal charge by affidavit and obtained a warrant for Petitioner's arrest for first degree murder (T. 484-485, 489-491, 496-497, 406-407). Yet still Petitioner was held incommunicado. The arrest warrant merely resulted in his being transferred from City Jail to County Jail. It was not until June 19, 1958, that he was finally allowed to make a telephone call and get a lawyer (A. 57, 133-134; T. 325, 463-465). The lawyer promptly filed a

petition for habeas corpus (T. 406-409, 495-497, 503), and there followed a preliminary hearing before a magistrate on June 24, 1958 (A. 105-106; T. 408)—the first time since June 1, 1958, that Petitioner was taken before a State official other than a police officer. Petitioner was bound over by the magistrate to the Grand Jury (T. 3), and was indicted on July 1, 1958, for first degree murder (T. 1-2).

Petitioner remained in jail pending trial. On July 18, 1958, a Negro police officer, Archie Langford, was asked by a detective to perform a special detail (A. 86-87; T. 377-379, 375, 297-299). Officer Langford was instructed to pose as a prisoner and share Petitioner's cell (A. 88, 54; T. 375-379, 297-299, 316, 329). His purpose was to "seek information" from Petitioner (A. 54, 87-88; T. 320, 377).

Officer Langford entered Petitioner's cell, posing as a prisoner being held on a murder charge, between 7 p.m. and 8 p.m. on Friday, July 18, 1958 (A. 41-42; T. 298-299, 301, 314, 329). He testified that he had not received any briefing on the facts of Petitioner's case whatsoever (A. 54, 72-73; T. 320, 352-355). That evening Langford "tried to open him [Petitioner] up" (A. 76-77; T. 358-359), and even woke Petitioner up once during the night (A. 79; T. 362), but Petitioner refused to talk about his case (A. 76-77, 86, 59; T. 302, 314-315, 358-359).

The next morning and thereafter Officer Langford devoted his efforts to gaining Petitioner's confidence. He gave Petitioner his breakfast (A. 43, 80; T. 302, 331, 348) and fed him candy (A. 48; T. 310, 331). He talked convincingly about his own fake crime (A. 43-45, 60-61; T. 302, 305, 306-307, 309, 311, 315, 363-364). Langford found Petitioner to be easy to wake up and sensitive (A. 55; T. 321, 347), uneducated and unable to understand a lot of words (A. 83; T. 370). He tried to steer the conversation to Petitioner's offense (A. 45-48, 51, 53, 62, 67; T. 303-304, 305, 307, 317-318, 321, 334), but Petitioner repeatedly said he did not want to talk about it (A. 44, 45, 46, 64, 76-77; T. 303, 304, 307, 337, 358-359) and had been

told not to talk about it by his lawyer (A. 46, 47, 51; T. 306, 307, 308, 315). In fact, Petitioner had asked to be in a single cell so he could be by himself (A. 85; T. 373).

As psychological prompting techniques when Petitioner refused to talk, Officer Langford would accuse him of being "crazy," of being a "rape artist," of having raped his wife, would pretend to be mad, would talk about water and drowning, until Petitioner's head ached, while at the same time he would alternate acts of kindness by giving Petitioner his food and sharing candy bars he brought with him (A. 44-48, 50, 62, 64, 69, 70, 76, 80; T. 333-334, 302-304, 307, 310, 312-313, 316-318, 321, 331, 333-334, 338-340, 346, 348, 353, 355, 358).

Finally, after Langford had been in the cell some 12 to 18 hours (A. 52, 78; T. 316), Petitioner began to talk about his case, and during the early morning hours from midnight to 3 a.m. Sunday morning (A. 47, 44-45, 52-53, 86; T. 309-310, 307, 318, 344), as Officer Langford expressed it, "Then he broke down. * * * he began to tell me his story" (A. 47; T. 309). Thus, Petitioner "broke" after some 31 hours of pressure, prodding and prompting by his cell mate.

In all Langford testified he was in Petitioner's cell continuously from between 7 p.m. and 8 p.m. on Friday, July 18, 1958, until removed Sunday, July 20, 1958, between 4 p.m. and 5 p.m., except for one brief three-minute absence on Friday evening (A. 72, 75; T. 355-356, 301).

Petitioner's statements to Officer Langford constitute his fifth confession. It was the first one introduced into evidence before the jury over Petitioner's objection (T. 328-384). It was referred to repeatedly by the State in its final argument (T. 609, 620-621, 627, 628, 630).

SUMMARY OF ARGUMENT

Question I.

Factually and conceptually this case is indistinguishable from *Massiah v. United States*, 377 U.S. 201 (1964). In both cases the prosecuting Government set out, by design or by use of trickery, to extract evidence from an accused's own lips in the absence of his counsel at a stage when the judicial process had formally begun by indictment. If anything, Petitioner's case is a more aggravated deprivation of Sixth Amendment right-to-counsel protections because here there was the use not only of trickery and design, but forced association for 45 continuous hours and psychological coercion. There can be no doubt that if this were a current federal case, it would be squarely governed by *Massiah*.

Likewise, the fact that this is a state, rather than a federal case does not alter the full application of the Sixth Amendment protections construed in *Massiah*. At least in capital cases, the right of a defendant in state criminal proceedings to the "assistance of counsel for his defense" under the 14th and 6th Amendments has been recognized since *Powell v. Alabama*, 287 U.S. 45 (1932). *Powell* and later cases, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948), and *Chandler v. Fretag*, 348 U.S. 3 (1954), make clear that this right is not limited to the trial alone, but includes the critical, pre-trial preparatory stage of the proceedings as well. And since *Gideon v. Wainwright*, 372 U.S. 335 (1963), there is no longer any distinction between the right-to-counsel enjoyed by a state court defendant and by his counterpart in federal court, even in non-capital criminal cases. The holding of this Court in *McLeod v. Ohio*, 381 U.S. 356 (1965), squarely establishes that the ruling in *Massiah* applies with undiluted force to state court cases. See also *People v. Flores*, 236 Cal. App.2d 807, 46 Cal. Rptr. 412 (1965).

The only question, then, is whether *Massiah* is to be afforded the normal, full effect of all the right-to-counsel

cases that preceded it, or whether it is to be treated specially, as certain later cases have been, and limited to prospective effect only. This involves the comparatively new Constitutional doctrine of "non-retroactivity."

Petitioner submits that the new doctrine of non-retroactivity comes into play only (a) when this Court arrives at a new Constitutional construction affecting criminal procedure which represents a definite, clear-cut change from past holdings or explicit dicta of this Court or from doctrine previously sanctioned by the virtually unanimous weight of authority of the overwhelming majority of American courts; (b) when the new Constitutional construction does not significantly involve the reliability or integrity of guilt determinations made in violation of its principles; and (c) when because of widespread reliance by state and federal law enforcement agencies on prior decisions of this Court or a multitude of lower courts in conducting their past business, retroactive application of the new construction would impose a staggering burden of retrials upon the state and federal governments.

None of these factors pertain to *Massiah*. *Massiah* overruled no prior decision, repudiated no prior dicta, overturned no overwhelming weight of authority. *Massiah* was clearly foreshadowed by *Powell v. Alabama, supra*, in 1932, and other cases, and was precisely anticipated by concurring opinions in *Spano v. New York*, 360 U.S. 315, 324-327 (1959). This clearly distinguishes *Massiah* from all the cases to which this Court has heretofore applied the doctrine of non-retroactivity.

Here, also, a review of the state court record shows that the deprivation of Petitioner's right-to-counsel inevitably affected the reliability and integrity of the finding of guilt, both as to its existence and its degree. Unlike violations of the 4th and 5th Amendments, deprivation of counsel after the judicial process has formally begun by indictment poses a clear danger of convicting the innocent. And finally, no widespread practice is here involved necessitating a multitude of retrials. Interrogation without counsel after

indictment, especially in capital cases, when the accused has usually obtained counsel, is rarely attempted, nor do law enforcement spokesmen claim its urgent necessity as they do for lawyerless interrogation during the investigation stage or after a mere arrest. The very fact that *Massiah's* retroactivity comes up at this late date, some seven years after its rendition, demonstrates that no heavy burden will be put on the administration of criminal justice by affording *Massiah* normal and regular effect. Considering all these factors, the new doctrine of "non-retroactivity" should not be applied to *Massiah*.

Question II:

The record in this case establishes from the State's own evidence that the confession extracted from Petitioner by Officer Langford during the 45 hours he forced his continuous presence on Petitioner was not a free and voluntary expression of Petitioner's will. Officer Langford entered Petitioner's cell disguised as a prisoner with the intent to seek information from Petitioner's lips. He found Petitioner to be sensitive and unable to cope with words (A. 55, 83; T. 370). Petitioner had only a sixth grade education and no prior experience with the police or jails (A. 133-134; T. 464). Officer Langford persistently prodded and probed Petitioner, waking him up at night, trying to make him talk about his case. Petitioner told him that his lawyer had advised him not to talk about his case and repeatedly told Officer Langford that he did not want to talk about it (A. 44-46, 51, 76-77; T. 302, 303, 304, 307, 314-315, 337, 358-359). But Officer Langford persisted, applying psychological pressure, pretending to be made, calling Petitioner crazy and a rape artist, talking about water and drowning until Petitioner's head ached, accusing Petitioner of raping his wife. At the same time he skillfully operated so as to gain Petitioner's confidence, telling elaborate falsehoods about his involvement in the murder of a Chinese man, giving Petitioner his prison food, and letting Petitioner eat his candy bars. Finally, after 12 to 18 hours, Petitioner's

repeatedly expressed resolve not to talk about his case weakened and after midnight early Sunday morning Petitioner broke down and told Officer Langford his story, some 31 hours after Langford entered his cell.

These circumstances are far more coercive and compulsory than those involved in the contemporary cases of *Leyra v. Denno*, 347 U.S. 556 (1954), and *Spano v. New York*, 360 U.S. 315 (1959), where confessions were extracted by trick and deception and the application of psychological pressure. Here, as in those cases, the confession—on an independent review of the record—should be held to be involuntary. Petitioner's statements to Officer Langford about his case were surely not made "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). When considered in the totality of the circumstances preceding it, involving flagrant violations of Petitioner's 4th, 5th, and 6th Amendment rights, as well as Florida statutory protections, the State of Florida's methods in extracting a confession from Petitioner and convicting him cannot be said to accord with Due Process under the 14th Amendment.

ARGUMENT

Question I

A. THIS CASE IS NOT DISTINGUISHABLE FROM MASSIAH v. UNITED STATES, 377 U.S. 201 (1964), ON ITS FACTS.

The record in this case shows that after Petitioner was indicted for first degree murder, and had obtained counsel, the State placed a Negro police officer in his cell, posing as a fellow prisoner, for the specific purpose of obtaining information from Petitioner to be used against him. The policeman, falsely claiming to be charged with murder, proceeded to converse with and interrogate Petitioner for hours on end, all the time worming his way into Petitioner's confidence by telling fictitious stories of his own criminal acti-

vities, and by giving Petitioner his food and candy. Petitioner did not want to talk about his case and repeatedly said so. Various psychological techniques were then applied by the decoy to overcome this unwillingness, e.g., accusing Petitioner of raping his deceased wife and of being crazy. Eventually Petitioner's determination not to talk about his case was overcome. After some 12 to 18 hours he began to talk about his case and later "broke down" (as Officer Langford expressed it) and told his story. The evidence so obtained was used over Petitioner's objection against him at his trial.

Massiah v. United States, 377 U.S. 201 (1964), involved the application of Sixth Amendment protections to an indicted accused in a federal case. It held that surreptitious interrogation of an accused in the absence of his counsel after the judicial process had formally begun, i.e., after indictment, was a violation of the accused's right to the assistance of counsel in his defense. Admissions or confessions so obtained are Constitutionally incompetent evidence.

Clearly Petitioner's conviction can not pass muster under the Sixth Amendment as interpreted in *Massiah*. The only possible distinction is that in *Massiah* the accused talked with an ex-confederate who had secretly become a government agent, whereas in Petitioner's case he talked with a policeman disguised as a fellow prisoner, a cell-mate, whom he had not known before. The State of Florida argued below that this element of imposing on a pre-existing confidence between persons already known to each other distinguishes this case from *Massiah*. Respectfully, Petitioner submits this distinction misses the point.

In both *Massiah* and this case, the investigation stage of the proceedings had been completed, at least in the sense that sufficient evidence had been obtained to formally charge the accused with a specific offense. In both, the defendants had been indicted and had obtained counsel. In both, the judicial process had formally begun. In both, the prosecuting government nevertheless schemed to interrogate the accused, by trick and artifice, without his counsel being

present and without his even realizing he was talking to his adversaries.[7] It is the purposeful action of the Government under these circumstances to extract evidence from an accused's own mouth without the protection of his lawyer that constitutes the deprivation of Sixth Amendment rights. It is inducing the formally-charged defendant, unknowingly and unwittingly, to convict himself without the protection of a lawyer that lies at the heart of the Constitutional violation. Relying on a pre-existing confidence is only one way for the Government to achieve this forbidden purpose. Another way is to build up a confidence by deception, as was done here. But in both cases the prosecuting Government set out, by trickery, to do that which the Constitution forbids—extract evidence from one formally accused without benefit of counsel.

As both Courts below seemed to agree in holding that *Massiah* should not be applied retroactively to this 1958 conviction, there is no rational way to distinguish what occurred in this case, in a Constitutional (Sixth Amendment) sense, from what this Court held the Government could not do under the Sixth Amendment in *Massiah*. Especially is this so since the record in this case shows conclusively, from the State's own witness, Archie Langford, that Petitioner did not spontaneously and freely and knowingly volunteer his statements to his prosecutors. It was only after hours of trying to open Petitioner up, only after being told over and over again that Petitioner did not want to talk about his case, that Officer Langford succeeded in breaking down Petitioner. This element of psychological coercion, in fact,

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[7] As this Court quoted from Judge Hays' dissent in the lower Court in *Massiah*, 377 U.S. at 206: "'In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.'" This factor, of course, distinguishes both *Massiah* and this case from situations where an accused in jail volunteers a confession to a genuine cell-mate not working for the police, or to a regular visitor not employed by the police as in *Procunier v. Atchley*, 401 U.S. 966 (1971). See *People v. Flores*, 236 Cal. App. 2d 807, 811-812, 46 Cal. Rptr. 412 (1965).

does distinguish this case from *Massiah* where it was almost absent—by making the Sixth Amendment violation here even more flagrant and disturbing, and by adding a Fifth Amendment dimension to the case.

There is another distinction with the same effect worth noting. In *Massiah* at least there was not much question about what the defendant did say to the under-cover police agent. The conversation was wired and another witness heard it. For the same reason there was also no credibility problem in *People v. Flores*, 236 Cal. App.2d 807, 46 Cal. Rptr. 412 (1965). But here a police agent spent a long time with an accused who had no choice but to share his company—alone. The agent then emerges and says the defendant "confessed." The defendant, as did Petitioner here, denies it. What results is a tremendous credibility issue which an accused stands little chance of winning, and then only by waiving his right to remain silent at the trial. The temptation thus present to dishonest, unscrupulous police agents could be well-nigh irresistible. But even with an honest officer there are problems.

For example, in this case there was never any doubt that Petitioner did kill his wife in the sense that any driver in a fatal automobile accident "kills" the person fatally hurt. An honest but over-eager officer, living continuously with the accused and hearing genuine feelings of remorse uncontrollably uttered, could easily without conscious deception construe and repeat such statements as a confession. In such a case, justice and truth-finding would hardly be served.

Here, also, there are some interesting aspects to Officer Langford's testimony. Langford testified positively that he was in Petitioner's cell continuously from Friday evening to late afternoon the following Sunday, with only one short three-minute departure from the cell (A. 72, 75; T. 355-356, 301). Petitioner, on the other hand, testified that Langford was in and out of the cell several times (A. 56; T. 323). This conflict is not particularly important in itself, except that Langford slipped later in his testimony and indi-

cated that, in this regard anyway, Petitioner and not he was telling the truth. Thus Langford later on in his testimony said that he had brought candy bars into the cell with him and that (emphasis added): "*Every time* I went out of the cell, he [Petitioner] would steal one and eat it. Knowing he was stealing *them*, I wouldn't say anything, because I wanted to work right along with him." (A. 48; T. 310) This certainly appears to corroborate Petitioner's testimony that Langford went in and out of the cell several times and to impeach Langford's contrary story and his credibility.

Langford further testified he had absolutely no briefing on the facts of Petitioner's case before entering the cell, not even to the extent of reading Petitioner's two written confessions already extracted in June (A. 54, 72-73; T. 352-355, 320). His only knowledge about the case, he said, came from street rumors he had heard about it in the "Negro area" of Miami (A. 72-75; T. 352-355; 320). Yet Langford also strangely knew, in questioning Petitioner in the cell, that Petitioner's deceased wife was wearing no underpants when she drowned (A. 62, 73-75; T. 333-334, 353-355), and that Petitioner had told him the "correct" date he had purchased the automobile involved (A. 50; T. 313). In short, Langford's testimony that he had *not* been briefed about Petitioner's case, if only by reading Petitioner's prior confessions, before entering Petitioner's cell to seek information, is incredible. Some serious doubts necessarily arise about Mr. Langford's candor and reliability.

In short, the method used here by the State of Florida in extracting a confession from Petitioner in the absence of his counsel is an even more unfair and unreliable one for the accused than was the method used by the federal Government and found to be proscribed by the Sixth Amendment in *Massiah*.

B. THE MASSIAH HOLDING FULLY APPLIES TO STATE CRIMINAL CASES.

Assuming, therefore, that if this were a current federal case, Petitioner's conviction could not stand under the Sixth Amendment, two further questions arise:

(1) Does the Fourteenth Amendment apply Sixth Amendment protections, as construed in *Massiah*, to the States?

(2) If so, do those Sixth Amendment protections, as construed in *Massiah* in 1964, apply to this 1958 conviction (or should *Massiah* be limited to "prospective" effect only)?

The answer to the first question, of course, cuts to the core of a long-standing Constitutional debate about the Fourteenth Amendment and whether it incorporates the Bill of Rights and applies their protections to State action. One who subscribes to the "total incorporation" theory has no difficulty with the answer—of course it is, yes. Likewise, one who subscribes to the polar theory, i.e., that none of the Bill of Rights, as such, is applied to the States but only those concepts therein that in the totality of circumstances of the particular case are essential to Anglo-American canons of fairness, ordered liberty and justice apply through the Due Process Clause to the States—will find both the question and the answer inadequate. (See later discussion of the totality of the circumstances of this case under Question II.) Only those who believe the Fourteenth Amendment differentiates among the Bill of Rights and applies some, but not others, to the States, or applies them in a different, less stringent way to State action as distinguished from Federal action, i.e., partial or selective incorporation, will be troubled with the inquiry and its resolution. See Friendly, *The Bill of Rights As A Code Of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965).

In brief, then, does *Massiah* state a construction of the Sixth Amendment which applies to State conduct through the Fourteenth Amendment? Petitioner submits it does.

Since *Powell v. Alabama*, 287 U.S. 45 (1932), it has been clear that in capital cases a defendant can not be denied the effective aid of counsel by a State at the trial or the pre-trial preparatory stage of the proceedings. The mere formality of a lawyer whose hands are so tied that he becomes more a spectator at his client's preordained conviction than a defender of one only accused and presumed innocent will not do.

Since *Powell* a steady line of cases have consistently afforded full Sixth Amendment right-to-counsel principles to defendants in State capital cases, and expanded the application to lesser, non-petty offenses. *Bute v. Illinois*, 333 U.S. 640, 674 (1948), and earlier cases suggested an absolute requirement of counsel in State capital cases. *Chandler v. Fretag*, 348 U.S. 3 (1954), referred to the right of one to be heard through his own counsel at every step of the proceedings against him as "unqualified." *Townsend v. Burke*, 334 U.S. 736 (1948), and *Moore v. Michigan*, 355 U.S. 155 (1957), emphasized again that the right to counsel in State cases is not confined to representation during the trial on the merits only.

And in the last decade or so the process of full-scale application of Sixth Amendment right-to-counsel principles to State criminal cases has been virtually completed. See *Spano v. New York*, 360 U.S. 315, 324-327 (1959) (concurring opinions of Mr. Justice Douglas and Mr. Justice Stewart); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Mempa v. Rhay*, 389 U.S. 128 (1967).

In no case since *Gideon* has a State court defendant been held to enjoy less of a right-to-counsel than his counterpart across the street in the Federal court. Indeed, of all the

guarantees expressed in the Sixth Amendment (and perhaps even the Bill of Rights for that matter), there are fewer reasons to dilute or differentiate the right-to-counsel in State cases from Federal cases in the interests of federalism than there may exist in regard to other Constitutional protections. This is so because the right-to-counsel is the one right without which all the others become empty paper slogans.

This point is aptly illustrated by the case at Bar. Petitioner was held incommunicado for 19 days (June 1 to June 19, 1958). He was not even arrested on a formal charge until June 13th, yet still he was held like a stray cat in a dog pound, completely cut off from the outside world, prey to both his captors and his fellow prisoners. At last he was allowed to telephone out and get a lawyer. The lawyer responded promptly and diligently. He filed a habeas corpus petition and within five days, on June 24, 1958, Petitioner was finally brought before a magistrate for a preliminary hearing—he was finally afforded his first legal right. In short, none of Petitioner's rights—Constitutional, statutory, Federal, State,[8] basic or non-basic—meant anything more than illusory, vapid, broken promises until he secured (perhaps too late) the right to counsel of his choice. To dilute this right is automatically to diminish *all* others. Petitioner submits that there can be no doubt that the Sixth Amendment right-to-counsel, as interpreted in *Massiah*, applies with full vigor by virtue of the 14th Amendment to State criminal cases, and especially to State capital cases. *McLeod v. Ohio*, 381 U.S. 356 (1965), squarely so held, albeit without an opinion. See also *Benton v. Maryland*, 395 U.S. 784 (1969).

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[8]See Sections 901.23 and 901.24, Fla. Stats. Anno. (Fla. Stats. 1957).

C. THE MASSIAH HOLDING SHOULD NOT BE GIVEN LIMITED, PROSPECTIVE EFFECT ONLY; AS WITH GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), AND OTHER RIGHT-TO-COUNSEL CASES PRECEDING MASSIAH, IT SHOULD BE ACCORDED NORMAL APPLICATION.

Is there any reason, then, that this Sixth Amendment right described in *Massiah* in 1964 should not be applied to Petitioner who was convicted in 1958?. Whatever justifications may exist for not applying fresh constructions of the Constitution "retroactively" in other cases,[9] Petitioner suggests that none of them applies here, and that he is entitled to the same protection of the Sixth Amendment as it was afforded Mr. Massiah.

Basically the considerations underlying the doctrine of non-retroactivity are pragmatic and practical. They come into play, Petitioner submits, *only* when this Court arrives at a Constitutional construction affecting criminal procedure which represents a definite, clear-cut change from past-adjudicated constructions of this Court. When this occurs, there looms the specter of having to retry and perhaps free thousands of already convicted defendants whose guilt was *reliably* determined under past-prevailing, now-rejected Constitutional standards. This consideration could well dampen fresh insights into the meaning and application of an 18th and 19th Century Constitution to late 20th Century circumstances. So the doctrine of non-retroactivity has evolved largely in the past six years to cope with the problem of

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[9]The doctrine of non-retroactivity for certain cases is, of course, itself a novel and fresh Constitutional construction. See Haddad, *"Retroactivity" Should Be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. Crim. L.C. & P.S. 417 (1969); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. Chi. L. Rev. 719 (1966). In by-gone days a criminal lawyer's heart used to leap for joy when he discovered a recent case covering his client's problem; now he shudders in fear of "non-retroactivity", and worries that his client will be foreclosed by the law's advance.

when a new Constitutional interpretation *which changes past constructions* will affect past convictions.

As it has evolved, Petitioner submits the doctrine contains at least the following three factors:

(1) For the doctrine to come into play at all, the new Constitutional construction must represent a definitive change, or departure, not merely an expanded application, of past constructions previously considered and adopted by this Court. In every instance, save two, that this Court has held a new construction non-retroactive beginning with *Linkletter v. Walker*, 381 U.S. 618 (1965), the decision held to be non-retroactive had overruled a specific, prior holding to the contrary by this Court.[10] The two excep-

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[10] *Linkletter* involved *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949). *Tehan v. Shott*, 382 U.S. 406 (1966), involved *Griffin v. California*, 380 U.S. 609 (1965), and *Malloy v. Hogan*, 378 U.S. 1 (1964), overruling *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947). *Johnson v. New Jersey*, 384 U.S. 719 (1966), involved *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), overruling "as no longer binding" (384 U.S. at 731) the cases of *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958). *Fuller v. Alaska*, 393 U.S. 80 (1968), involved *Lee v. Florida*, 392 U.S. 378 (1968), overruling *Schwartz v. Texas*, 344 U.S. 199 (1952). *Desist v. United States*, 394 U.S. 244 (1969), involved *Katz v. United States*, 389 U.S. 347 (1967), overruling *Goldman v. United States*, 316 U.S. 129 (1942), *Olmstead v. United States*, 277 U.S. 438 (1928), and *On Lee v. United States*, 343 U.S. 747 (1952). *Kaiser v. New York*, 394 U.S. 280 (1969), like *Desist* and *Fuller* involved *Katz v. United States, supra*, and *Lee v. Florida, supra*. *Jenkins v. Delaware*, 395 U.S. 213 (1969), presents the same situation as *Johnson v. New Jersey, supra*. *Williams v. United States*, 401 U.S. 646 (1971), and *Hill v. California*, 401 U.S. 797 (1971), involved *Chimel v. California*, 395 U.S. 752 (1969), overruling *Harris v. United States*, 331 U.S. 145 (1947), and *United States v. Rabinowitz*, 339 U.S. 56 (1950). And *Mackey v. United States*, 401 U.S. 667 (1971), involved *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), overruling *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955).

tions are *Stovall v. Denno*, 388 U.S. 293 (1967), holding *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the line-up cases, to be non-retroactive in effect; and *DeStefano v. Woods*, 392 U.S. 631 (1968), holding *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), the jury trial cases, non-retroactive.

But in each of these two exceptions, the new construction was a definitive change and a departure from precedent albeit no prior decision of this Court was specifically overruled. Thus, *Duncan v. Louisiana*, 391 U.S. 145 (1968), involved repudiation of earlier, specific statements—powerful, explicit dicta—in prevailing opinions of this Court in *Maxwell v. Dow*, 176 U.S. 581 (1900); *Palko v. Connecticut*, 302 U.S. 319 (1937); and *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Similarly, the line-up cases involved in *Stovall v. Denno*, *supra*, were based in large part on the earlier overruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), of the case of *Betts v. Brady*, 316 U.S. 455 (1942). Moreover, they involved express repudiation of the "overwhelming majority of American courts" on the issue, involving a "virtually unanimous weight of authority" which had been fairly relied upon by law enforcement agencies across the Nation. 388 U.S. at 299-300. These two cases (*Wade* and *Gilbert*) were not foreshadowed by earlier decisions and involved a procedure which this Court noted had up until their rendition been uniformly followed by the law enforcement officials of the Federal Government and of all 50 States. 388 U.S. at 299. Surely these cases, *Stovall* and *DeStefano*, as well as all of the others in which non-retroactivity has been held to apply, show clearly that the doctrine is limited to exceptional circumstances as an extraordinary departure from the normal rule.

(2) The new Constitutional construction, even though a definitive change, will still be given normal effect, i.e., applied retroactively, if it significantly involves the reliability

or integrity of the determination of guilt in the past proceedings.[11]

(3) The third factor concerns the effect of retroactive application of the new construction on State and Federal systems of criminal justice. Will retroactive application, because of prevailing practices based on widespread reliance by the police and prosecutors on prior decisions or explicit dicta of this Court, impose a staggering burden of retrials upon the State and Federal governments?

Applying these factors to *Massiah* and the case at Bar, it is respectfully submitted that there is no persuasive reason to give *Massiah* less than ordinary, normal effect, i.e., in regard to *Massiah* there is not sufficient justification to invoke the doctrine of non-retroactivity. *Massiah* overruled no prior decision of this Court; it repudiated no explicit, past dicta; it involved no widespread practice generally followed by law enforcement agencies in fair reliance on virtually unanimous authority of American courts.

Massiah is a direct lineal descendant, as previously discussed, of *Powell v. Alabama*, 287 U.S. 45 (1932); *Bute v. Illinois*, 333 U.S. 640 (1948); *Townsend v. Burke*, 334 U.S.

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[11] See *Griffin v. Illinois*, 351 U.S. 12 (1956) (equal protection clause; right of pauper to free transcript); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (6th & 14th Amendments; right to counsel); *Douglas v. California*, 372 U.S. 353 (1963) (equal protection clause; 6th & 14th Amendments; right to counsel on appeal); *Jackson v. Denno*, 378 U.S. 368 (1964) (5th & 14th Amendments; self-incrimination clause; procedure to determine voluntariness of a confession); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (6th & 14th Amendments; right to an impartial jury in capital cases); *Roberts v. Russell*, 392 U.S. 293 (1968) (6th & 14th Amendments; right to confrontation); *McConnell v. Rhay*, 393 U.S. 2 (1968) (6th & 14th Amendments; right to counsel); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (6th & 14th Amendments; right to counsel); *Berger v. California*, 393 U.S. 314 (1969) (6th & 14th Amendments; right to confrontation); *Ashe v. Swenson*, 397 U.S. 436 (1970) (5th & 14th Amendments; double jeopardy clause); *United States v. United States Coin and Currency*, 401 U.S. 715 (1971) (5th & 14th Amendments; self-incrimination clause).

736 (1948); *Chandler v. Fretag*, 348 U.S. 3 (1954); *Moore v. Michigan*, 355 U.S. 155 (1957); *Spano v. New York*, 360 U.S. 315, 324-327 (concurring opinions); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); and *White v. Maryland*, 373 U.S. 59 (1963). *Massiah* issued from this line of cases with an impeccable pedigree, clearly foreshadowed in 1959 in the *Spano* concurring opinions and insofar as capital cases are concerned particularly anticipated by *Powell v. Alabama*, *supra*,[12] and unblemished by *Betts v. Brady*, 316 U.S. 455 (1942). Certainly the State of Florida was not relying on any decision of this Court, or any dicta either, when it decided to put Officer Langford in Petitioner's cell to extract information from him during the months between his indictment for first degree murder and his trial.

Each of the right-to-counsel cases preceding *Massiah* (insofar as the question has arisen) has been afforded normal, retroactive application. *Massiah* logically falls with this preceding group of decisions, rather than with the following generation of cases involving definitive departure from past precedent as illustrated by *Escobedo*, *Miranda*, *Wade* and *Gilbert*. This is not to disparage these later cases, by any means, but they are simply a different breed of decision from *Massiah*.

Indeed, this Court has already ruled so as to indicate this distinction in *McLeod v. Ohio*, 381 U.S. 356 (1965), where

[12] As this Court stated in *Massiah*, 377 U.S. at 205: "This view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama*, 287 U.S. 45, * * *." Indeed, *Massiah* was specifically anticipated beforehand by the Court of Appeals below in *Lee v. United States*, 322 F.2d 770 (5 Cir. 1963). However, another panel of that Court repudiated *Lee* in *Lyles v. Beto*, 329 F.2d 322 (5 Cir. 1964). This Court then vacated the *Lyles v. Beto* judgment and remanded for consideration in light of *Massiah*. 379 U.S. 648 (1965). On remand the Court of Appeals limited *Massiah* to prospective effect only and adherred to its decision. 363 F.2d 503 (5 Cir. 1966). Further review in this Court was not sought thereafter.

Massiah (1964) was given retroactive effect in reversing (on direct review) a 1961 Ohio murder conviction involving a post-indictment statement obtained in the absence of counsel in 1960.[13] By way of contrast, *Escobedo* and *Miranda* have been held to apply only to initial trials (not retrials) conducted after their dates; and *Wade* and *Gilbert* apply only to cases where the identification confrontation was conducted after their rendition regardless of the trial date. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Jenkins v. Delaware*, 395 U.S. 213 (1969); *Stovall v. Denno*, 388 U.S. 293 (1967). The *McLeod* case thus squarely places *Massiah* with the earlier line of cases, e.g., *Gideon v. Wainwright*, *supra*;[14] *White v. Maryland*, *supra*; *Hamilton v. Alabama*, *supra*, all of which have been given normal, regular application. *Arsenault v. Massachusetts*, 393 U.S. 5 (1968); see *McConnell v. Rhay*, 393 U.S. 2 (1968).

The second consideration concerns whether the denial of counsel to Petitioner in this case affected the reliability of his conviction. True, Petitioner allegedly "confessed" five times. But this in itself is a rather remarkable circumstance. Usually one or two voluntary confessions will be deemed sufficient by the prosecutor and will satisfy the police. Why did the State of Florida want a *fifth* confession from Petitioner in this case?

Petitioner respectfully submits that one can not read this State court transcript and conclude that, despite the deprivations of Petitioner's right-to-counsel, the jury indubitably arrived at a verdict that reflects the whole truth. In large part this is so because of the already-expressed doubts about

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[13] In a similar case on direct review, California has also applied *Massiah* retroactively in *People v. Flores*, 236 Cal. App. 2d 807, 46 Cal. Rptr. 412 (1965).

[14] To be sure, *Gideon* involved the overruling of *Betts v. Brady*, *supra*, but it also involved a Constitutional protection affecting the reliability of the guilt determination made in its absence. Thus, when Mr. Gideon was granted his Sixth Amendment right-to-counsel and retried, he was found to be innocent.

the reliability of Officer Langford's testimony and the unfair method used here by the State of Florida as distinguished even from the method used in *Massiah* by the United States and by the State of California in *People v. Flores, supra*, or the method used by the State of Ohio in *McLeod v. Ohio, supra*. Presence of counsel, if not circumvented, would have eliminated these defects.

For eleven days of isolated confinement and intensive interrogation, Petitioner—an uneducated young Negro with no friends, no visitors, no counsel, and no prior police experience—stoutly maintained his innocence even while under truth serum and during a lie-detector test. When locked up after the fatal night, he first tried to call his "wife's folks" but was denied permission. Petitioner himself barely escaped from the Miami River with his life. The finger of guilt does not point with unwaving steadiness at Petitioner.

Petitioner was first tried for eleven straight days in June, 1958, in a secret kangaroo court conducted by the Miami police while they blocked him from securing legal advice of his own choice. These kangaroo proceedings zealously continued into July even after formal judicial proceedings had commenced and counsel was retained, but in such a way as to deliberately circumvent and exclude both court and counsel. A jury verdict based almost entirely on evidence so secured can hardly be deemed reliable. Particularly is this true in a capital case involving degrees of homicide. But for the State's deliberate interference with Petitioner's right-to-counsel, he might well have been found innocent or guilty of a lesser degree of homocide than first degree murder.

The very purpose of the *Massiah* interpretation is to ensure "effective representation by counsel" after an accused has been formally charged by indictment. 377 U.S. at 204. Our system contemplates that a judicial trial will follow an indictment, not a secret brain-washing ala the Stalin purge trials of the 1930's.[15] This basic premise of the *Massiah*

[15] See Koestler, *Darkness at Noon*.

ruling distinguishes other decisions involving the Fourth Amendment search and seizure clause (e.g., *Mapp v. Ohio*, *supra*) or decisions effectuating the Fifth Amendment's privilege against self-incrimination. These Fourth and Fifth Amendment rights are equally fundamental to preserving our free society, but they do not concern "the very integrity of the fact-finding process" itself as does the right-to-counsel, which when denied, poses "the clear danger of convicting the innocent." See *Johnson v. New Jersey*, 384 U.S. at 728.

If ever an accused needed a lawyer when held on suspicion of homicide and then charged with murder, Petitioner did. But the State of Florida here repeatedly acted, before indictment and *after*, to deprive Petitioner of the effective aid of counsel he so desperately needed. It can not be said that his conviction is nevertheless reliable.

Finally, in regard to the third consideration, it is quite clear that no widespread, generally accepted practice involving a multitude of cases is here involved. As distinguished from pre-indictment interrogation, which many law enforcement officers feel is indispensable to the fulfillment of their duties,[16] it is only the exceptional case where interrogation after indictment, with the judicial process formally begun, is either deemed necessary or attempted. The reason for this is obvious. After indictment most defendants have lawyers (at least since *Gideon* in 1963). And most lawyers, as Mr. Justice Jackson noted in *Watts v. Indiana*, 338 U.S. 49, 57-62 (1949), will tell their clients "in no uncertain terms to make no statement to police under any circumstances." So post-indictment interrogation is simply not a widespread

[16] See Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. Crim. L. C. & P. S. 16 (1961), where the author objects vehemently to supplying counsel to arrestees prior to indictment, but concedes that counsel "should be accorded *and provided*" to all defendants in all cases "at the time of trial, or even at the very start of the judicial process."

practice.[17] Questioning a suspect either to absolve or implicate him is commonplace. Questioning an arrestee is a uniform practice. But after indictment, the legitimate function of interrogation becomes extinct.[18] Significantly, the police felt the need (for reasons one can only surmise) for further information from Petitioner in this case after indictment despite days of prior interrogation and four confessions. Yet they did not even attempt a straight-forward approach; they resorted to subterfuge and trickery. Indeed, the very fact that *Massiah's* retroactive effect is still an open question some seven years after its rendition demonstrates that the number of cases involving the problem of post-indictment interrogation in the absence of counsel is not large. In short, no threat either to the safety of the public or to the administration of criminal justice is posed by applying *Massiah* to Petitioner's 1958 conviction.

In summary, *Massiah* was not a definitive departure from prior decisions of this Court. No rule relied upon by law enforcement agencies across the Nation was overturned. The deprivation of counsel affected Petitioner's ability to defend himself and impugned the integrity of his conviction. No burdensome effect on State administration of justice will result from according *Massiah* normal effect. For these reasons, Petitioner respectfully submits there is no justification for denying him the Sixth Amendment protections described in *Massiah* and made applicable to the State of Florida by the Fourteenth Amendment. The non-retroactivity doctrine should not be applied to *Massiah*.

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[17] This of course distinguishes *Massiah* from the line-up cases, *Wade* and *Gilbert*, where post-indictment confrontations *are* common and widespread.

[18] Certainly the *Massiah* rule does not hamper the police in their war on organized crime. A sophisticated criminal will not talk with police before indictment, much less afterwards. It is only the ignorant, inexperienced accused who is protected by *Massiah*.

Question II

A. UPON AN INDEPENDENT REVIEW OF THE TOTALITY OF CIRCUMSTANCES PRECEDING ITS EXTRACTION, PETITIONER'S CONFESSION TO OFFICER LANGFORD WAS CLEARLY AN INVOLUNTARY CONFESSION AND ITS ADMISSION INTO EVIDENCE WAS A VIOLATION OF PETITIONER'S FOURTEENTH AND FIFTH AMENDMENT RIGHTS.

Even if this Court should conclude that *Massiah* is to be applied only prospectively, Petitioner is yet entitled to a consideration of the voluntariness of his confession to Officer Langford in light of the total circumstances of his case. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Davis v. North Carolina*, 384 U.S. 737 (1966). Such a consideration compels a conclusion that he was not convicted in accordance with the requirements of Due Process under the Fourteenth Amendment. What does the totality view here disclose?

(1) *Violation of Fourth Amendment Rights.*

Petitioner's person was seized on June 1, 1958, and he was held incommunicado for 13 days without being informed of any charge against him and without any formal charge being made. On the 13th day, his captors filed an affidavit with a magistrate and obtained a warrant authorizing his arrest for first degree murder. In short, Petitioner was held for 13 days in violation of the Fourth Amendment's command that:

> "The right of the people to be secure in their persons * * * against unreasonable seizures, shall not be violated. * * *."

During this period he was injected with truth serum, tested on a lie detector, and four confessions plus a "consent" to search his abode were extracted, all without benefit of counsel or magistrate. See *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963). While these Fourth Amendment violations in 1958

may not have entailed the exclusion of evidence obtained thereby, their occurrence is surely a circumstance to be considered.

(2) *Violation of Clear State Statutes.*

Florida Statutes (Section 901.23, Fla. Stats. 1957; Sec. 901.23, Fla. Stats. Anno.) required that Petitioner be brought promptly and without unreasonable delay before a magistrate upon his arrest. He was formally arrested on June 13, 1958, yet was not brought before a magistrate until June 24, 1958.

Likewise, Section 901.24, Fla. Stats. 1957 (Sec. 901.24, Fla. Stats. Anno.) had been construed by the Florida courts and the Florida Attorney General as granting one in custody or arrested a right to obtain counsel and to consult with counsel without unreasonable delay. This, of course, was flagrantly violated by the State in Petitioner's case. See *Milton v. Cochran*, 147 So.2d 137, 140-141 (1962); 1946 Op. Atty. Gen. (Fla.) 738 (advising that a sheriff does not have the right to deny a person arrested for a felony the right to have an attorney prior to completion of the investigation).

While these are merely violations of State statutes, the fact they were violated without the semblance of justification is a circumstance relevant to the Due Process inquiry. See *Powell v. Alabama*, 287 U.S. 45 (1932), where the State similarly ignored its own statutory provisions for the protection of the accused and this was deemed a factor to be considered in the Due Process determination.

(3) *Violation of Fifth Amendment Rights.*

In all candor, the voluntariness of Petitioner's first four confessions was not argued or briefed in the Courts below. But evidence concerning them (i.e., the State court transcript) was submitted and received, and they have never before been considered in a federal court. Should all else fail, Petitioner would respectfully ask that his case be remanded

to the District Court for a fuller inquiry into this aspect of his case. And in any event, the circumstances are relevant to a review of the totality of the circumstances leading up to Petitioner's last confession and his conviction.

The evidence concerning these confessions has already been recited in the Statement section of this brief. Suffice it to say that Petitioner does not believe that an independent review of this record, even accepting the testimony of the State's witnesses, can show that he chose to speak the June confessions "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Lisenba v. California*, 314 U.S. 219, 241 (1941).

Compared with both pre-1958 and post-1958 decisions of this Court, the circumstances of this case stand out as particularly aggravated. Petitioner was young, impoverished, uneducated, injured, and totally without experience with the police. He was held incommunicado and isolated except for persistent police interrogation for eleven days until he confessed. During that time he saw no friend, relative, or attorney. He was not allowed to make telephone calls. He was given truth serum and lie detector tests.

In *Haley v. Ohio*, 332 U.S. 596, 601 (1948), this Court stated:

> "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."

There a 15-year old boy was questioned by police in relays from midnight to 5 a.m. while held incommunicado without counsel, family, or friends. His confession was ruled involuntary.

A series of cases have held that a confession extracted by the pressure of unrelenting interrogation while holding the accused incommunicado and exerting psychological

coercion will not square with Fourteenth Amendment Due Process standards.[19]

Three cases particularly bear a marked resemblance to the totality of circumstances here involved insofar as the first four confessions are concerned. Each involved uneducated, impoverished Negros in Southern communities. In *Fikes v. Alabama*, 352 U.S. 191 (1957), an accused of low mentality was held in isolation without friend, relative or counsel for five days during which he was intermittently questioned for several hours at a time. *Payne v. Arkansas*, 356 U.S. 560 (1958), involved a 19 year old Negro with a fifth grade education, held incommunicado for three days with little food and in fear of mob violence. *Davis v. North Carolina*, 384 U.S. 737 (1966), concerned an adult Negro with a third or fourth grade education held incommunicado for 16 days and interrogated intermittently every day. In each case, on an independent review of the record and considering all of the circumstances, this Court concluded that the extracted confession was not the product of the defendant's free and voluntary will.

Here, the question of whether Petitioner's first four confessions were voluntary or not under Fourteenth Amendment standards may not be squarely presented, but clearly the circumstances which make that question stand out starkly in this record are part of the total circumstances before this Court in considering whether the entire treat-

[19] *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (5 days of constant questioning in relays); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of relay interrogation while held incommunicado); *Chambers v. Florida*, 309 U.S. 227 (1940) (5 days of continued interrogation while held incommunicado; fear of lynching or mob violence used by police); *Malinski v. New York*, 324 U.S. 401 (1945) (interrogation while held incommunicado, stripped naked and in fear of a shellacking); *Colombe v. Connecticut*, 367 U.S. 568 (1961) (prolonged detention with systematic interrogation 3 hours per day); *Haynes v. Washington*, 373 U.S. 503 (1963) (defendant held incommunicado for 16 hours, refused permission to telephone his wife); *Clewis v. Texas*, 386 U.S. 707 (1967) (defendant held incommunicado 38 hours while ill, without sleep or counsel).

ment accorded Petitioner by the State leading up to his fifth confession and conviction accorded with standards of civilized decency and ordered liberty protected by the Fourteenth Amendment.

In regard to the voluntariness of Petitioner's fifth confession in July, 1958, to Officer Langford—which was squarely presented and ruled upon in the Courts below—the facts again need not be restated. It is clear from Officer Langford's own testimony that the pressure of persistent questioning going on for hours, day and night—even waking Petitioner up in the middle of the night (A. 55, 70, 79; T. 321, 347, 362)—plus the use of coercive psychological techniques[20] eventually stripped Petitioner of his unfettered, clear, and repeatedly expressed will not to talk about his case. Langford by no means was just a listening post, a passive ear recording Petitioner's noises. He forced Petitioner to the point of a "break down" as he himself described it (A. 47; T. 309).

Few people could withstand the continuous prying, prodding, and prompting of a trained and skilled interrogator intimately sharing a confined, cramped cell day and night for 45 hours. Petitioner, with his sixth grade Mississippi education, never in jail before, lasted 12 to 18 hours. At that point his will to follow his attorney's advice not to discuss his case was overcome, but it was still not until early Sunday morning, in the wee hours before dawn and after some 30 hours of being forced to share Officer Langford's company, that he finally "broke down" and confessed according to Officer Langford. It can not be fairly said his "confession" was the exercise of an unfettered will.

In *Leyra v. Denno*, 347 U.S. 556 (1954), the police used a psychiatrist, posing as a nose doctor brought in to treat.

[20] E.g., talking about drowning and water until it made Petitioner's headache, feigning madness, accusing Petitioner of raping his wife, accusing Petitioner of being crazy, all interspersed with calculated actions to gain Petitioner's confidence (see pp. 13-14, Statement of the Facts, *supra*).

defendant's sinus condition, to extract a confession. And in *Spano v. New York*, 360 U.S. 315 (1959), a fledging police officer who was a friend of the accused was induced to tell him falsehoods and exert psychological pressure; after refusing three times, the accused succumbed to his friend's prevarications and agreed to confess. In both cases the confession was held not to be the product of a free and voluntary will.

Surely under these contemporary standards Petitioner's statements to Officer Langford after 12 to 18 hours of repeatedly telling him he did not want to discuss his case (A. 44-46, 76-77; T. 303, 304, 307, 337, 358-359), can not be deemed free and voluntary expressions under the Fifth and Fourteenth Amendments.

(4) *Violation of Sixth Amendment Rights.*

Even if *Massiah* is deemed to apply prospectively only, the 1958 violations of Petitioner's Sixth Amendment right-to-counsel remain a circumstance to be here considered in the context of Due Process under the Fourteenth Amendment. There is no need to repeat their description now. Suffice it to say, Petitioner was totally deprived of counsel of his choice for 19 days from June 1 to June 19th.

This is not a case involving the failure to supply counsel to an indigent. Once allowed to make a telephone call, Petitioner got his own lawyer. Rather, this is a case where the State for days on end blocked Petitioner from obtaining any legal assistance whatsoever at a time when he desperately needed it. To advise an accused of his right to counsel, as Detective Holmes testified he did, but prevent him from calling one, as happened here, is a cruel mockery of the Sixth Amendment. See *Chandler v. Fretag*, 348 U.S. 3 (1954); *Ferguson v. Georgia*, 365 U.S. 570 (1961)

There followed on top of this the July scheme of the State to circumvent Petitioner's lawyer, finally obtained, by placing a disguised decoy in Petitioner's cell to extract "information" from his lips.

(5) *Summary*

On the totality of all of these circumstances–Constitutional violations pyramided onto statutory violations–Petitioner submits that this Court in 1958 (had it then reviewed the case) would not have concluded that Petitioner's "confession" to Officer Langford was a voluntary expression of his unfettered will nor that Petitioner's conviction met the standards of Due Process under the Fourteenth, Sixth, Fifth, and Fourth Amendments. Petitioner asks that the Court so rule at this time.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that the judgment below be reversed and that this case be remanded to the District Court with instructions to grant the petition for habeas corpus.

Respectfully submitted,

NEAL P. RUTLEDGE

Counsel for Petitioner

in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
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NO. 70-5012

GEORGE WILLIAM MILTON,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
QUESTIONS PRESENTED	2
SUMMARY	3
ARGUMENT	
Question I	4
The Allegedly Inadmissible Confession Could, At Most, Constitute Harmless Error in View of the Prior Confessions and the Overwhelming Evidence at Petitioner's Trial.	
Question II	11
Assuming Arguendo That The Question of the Admissibility of the Prior Confessions will be Reviewed By This Court, the Voluntariness of the Prior Confessions was Appropriately Determined By Procedures Specifically Authorized By This Court.	
Question III	21
Assuming Arguendo That This Court Does Review The Earlier Confessions And Does Decide That Inappropriate Procedures Were Employed To Determine The Voluntary Nature Of Those Earlier Confessions, The Principle Of Right To Counsel Encompassed By *Massiah* Should Not Be Extended To Apply To Petitioner's Later Confession To Archie Langford.	

INDEX (cont.)

Page

A. Because of the particular facts of this case

B. Because the petitioner had a full hearing as to the voluntary nature of his statements

C. Because the petitioner himself denied coercion at the time of the trial

Question IV 23

If This Court Deems It Necessary To Consider The *Massiah* Decision, Despite The Preceeding Arguments, The Principle of The Non-Retroactivity Of *Massiah* Should Be Upheld.

A. There is general agreement among the Circuit Courts that a normal application of *Massiah* means prospective application.

B. A retroactive application of *Massiah* would be inconsistent with prior similar decisions.

Question V 28

A Review Of The Procedures Employed In The Lower Courts Explicitly Supports The Conclusion That Defendant's Statements To Archie Langford Were Voluntary And Admissible.

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF CITATIONS

Case	Page
Bynum v. State of Illinois, 373 U.S. 528 (1963)	32
Chapman v. California, 386 U.S. 18 (1967)	5
Davis v. North Carolina, 384 U.S. 737 (1966)	29, 30
Davis v. North Carolina, 253 N.C. 86, 116 S.E.2d 365 (1966)	31
Desist v. United States, 394 U.S. 244 (1969)	26
Escobedo v. Illinois, 378 U.S. 478, (1964)	27
Gilbert v. California, 388 U.S. 263, (1967)	27
Graham v. State, 91 So.2d 662 (Fla. 1956)	11
Harrington v. United States, 395 U.S. 250 (1969)	5
Jackson v. Denno, 378 U.S. 368 (1964)	11, 23

TABLE OF CITATIONS (cont.)

Case	Page
Johnson v. New Jersey, 384 U.S. 719, (1966)	25, 26, 27
Lawn v. United States, 355 U.S. 339 (1958)	9
Lyles v. Beto, 363 Fed.2d 503 (1966)	24
Milton v. Cochran, 147 So.2d 137 (1963)	32
Milton v. State, 125 So.2d 880 (Fla. 1960)	9
Milton v. Wainwright, 306 F.Supp. 939 (So. Dist. Fla. 1969)	24
Milton v. Wainwright, 428 F.2d 463 (1970)	28
Miranda v. Arizona, 384 U.S. 436 (1966)	27
Namet v. United States, 373 U.S. 179 (1963)	9
National Licorice Company v. National Labor Relations Board, 309 U.S. 350 (1940)	10

TABLE OF CITATIONS (cont.)

Case	Page
Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960)	10
Rogers v. Richmond, 365 U.S. 534 (1961)	32
Townsend v. Sain, 372 U.S. 293 (1963)	28, 31, 32
U.S. ex rel. Allison v. New Jersey, 418 F.2d 332 (1969)	24
U.S. ex rel. Dickerson v. Rundle, 430 F.2d 462 (1970)	24
U.S. ex rel. Long v. Pate, 418 F.2d 1028 (1970)	24
U.S. ex rel. Romano v. Fay, 360 F.2d 389 (1966)	24
United States v. Wade, 388 U.S. 218, (1967)	27
Young v. United States, 107 F.2d 490 (5th Cir. 1939)	25
Young v. Wainwright, 326 F.2d 255 (5th Cir. 1964)	32

TABLE OF CITATIONS (cont.)

OTHER AUTHORITIES

	Page
United States Supreme Court Rule 40 (d) (2)	10
Florida Statute 901.23	32

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Supreme Court
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OCTOBER TERM, 1971

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Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

I

WOULD THE ALLEGEDLY INADMISSIBLE CONFESSION CONSTITUTE A BASIS FOR REVERSAL IN VIEW OF PRIOR UNCHALLENGED CONFESSIONS AND THE OVERWHELMING EVIDENCE OF GUILT?

II

ASSUMING THAT THE QUESTION OF THE ADMISSIBILITY OF THE PRIOR QUESTIONS WILL BE REVIEWED BY THIS COURT, WAS THE VOLUNTARY NATURE OF THE PRIOR CONFESSIONS APPROPRIATELY DETERMINED BY PROCEDURES SPECIFICALLY AUTHORIZED BY THIS COURT?

III

SHOULD THE PRINCIPLE OF RIGHT TO COUNSEL ENCOMPASSED IN *MASSIAH* BE EXTENDED TO THIS CASE?

IV

SHOULD *MASSIAH* BE APPLIED RETROACTIVELY?

V

WOULD A REVIEW OF THE PROCEDURES EMPLOYED IN THE LOWER COURTS SUPPORT THE CONCLUSION THAT THE STATEMENTS TO ARCHIE LANGFORD WERE VOLUNTARY AND ADMISSIBLE?

SUMMARY

This summary is designed to constitute a brief recapitulation of the issues in this case. Citations of authority have been omitted insofar as they appear in the more detailed argument portion of this brief. The State has attempted to reconstruct the issues to reflect that which is, hopefully, a more accurate view of this case.

First, it is our contention that the allegedly inadmissible confession, if in fact inadmissible, would merely constitute harmless error. There are other, prior, confessions elicited from the defendant which are not challenged in this appeal. Further, there was overwhelming evidence against the defendant. In view of those factors, the single confession being challenged could, at most, constitute harmless error.

Second, the question of the admissibility of the earlier confessions was determined by procedures specifically mandated by this Court. Neither those procedures, nor the conclusions arrived at through these procedures, have been effectively challenged. Therefore, it is clear that the voluntariness of those confessions is not subject to further dispute.

Third, it is, in view of the above arguments, not necessary to consider whether *Massiah* applies to this case. However, if such is considered, it is clear that it is undesirable to extend the facts of *Massiah* to the case at bar. Such an extension would put serious restrictions upon the introduction of virtually all evidence which is voluntarily given.

Fourth, it should not be necessary to consider the retroactivity of *Massiah* in view of the arguments above. However, if that question is considered, the decisions of the Circuit Courts applying *Massiah* prospectively should be affirmed. Failing to do so would adversely affect our system of criminal justice according to standards set forth by this Court. It would also lead to unwarranted confusion in view of the prospective applications of *Miranda and Escobedo.*

Fifth, by no stretch of the imagination could the statements to Officer Langford be deemed involuntary in accordance with general standards existing prior to *Massiah.* No coercion of any type was alleged by the prisoner at the time of trial. No coercion of any type is documented by petitioner in his brief.

I

THE ALLEGELDY INADMISSIBLE CONFESSION COULD, AT MOST, CONSTITUTE HARMLESS ERROR IN VIEW OF THE PRIOR CONFESSIONS AND THE OVERWHELMING EVIDENCE AT PETITIONER'S TRIAL.

The major thrust of the petitioner's argument in the Federal Courts has been that his statements made to Archie Langford in the jail cell should have been excluded. Before considering the merits of that contention, it is important to note that this issue if resolved by this Court in favor of the defendant, would provide the defendant with no possible basis for belief. That such a determination would be moot is clear from a review of all the facts of

this case. In addition to the disputed statements, there are several prior confessions, as well as other overwhelming evidence of guilt. Therefore, if this Court should decide to reverse the lower Court's holding regarding the admissibility of the confession, it would, at most, constitute harmless error. *Harrington v. United States*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

An examination of the trial record strongly urges the conclusion that none of the confessions would have been necessary to obtain a conviction. There is ample and conclusive evidence to establish the charge that the events of June 1, 1958 constituted no accident but, rather, premeditated murder.

The State proved that the defendant was hauled out of the Miami River in the early morning hours of June 1, 1958. Cedric Meton testified that he resided on a yacht called "Ladama" which is docked at the Miami River at 385 N.W. South River Drive and that he heard a call for help from the river at approximately 3:03 in the morning. Meton pulled the defendant out of the water and called the police (R. 101-102). Meton testified that the boats along the river bank formed a solid line except for a *single gap* of approximately twenty-five feet in length (R. 100-101).

Meton further testified that he was present the next morning when a car was pulled out of the river (R. 105). Meton observed that the windows in the car were up and that a body was taken out of the car (R. 111-112). The body, was, of course, that of Minnie Claybon who had, according to the medical examiner, died of drowning (R. 76-85). Meton also observed that the police had to

break into the car with tools (R. 112-113). Police officer Lawrence McGraw arrived at the scene at approximately 3:32 in the morning of June 1, 1958 and found the defendant, the man Meton pulled out of the river, lying on the pavement (R. 145-150). McGraw testified that when he saw the defendant lying there on the pavement that he, the defendant, kept insisting that he drove his car into the river. McGraw's testimony in this regard is reflected in the record as follows (R. 148):

> "Q When you saw this defendant lying on the pavement describe if you will, what he was doing, what he was saying, if anything.
>
> A Well, he kept insisting that he drove his car into the river."

The police dragged the bottom of the Miami River with grappling hooks to locate the car. Wesley Curt Speakman of the Harbor Patrol of the Miami Police Department testified that the search for the car on the river bottom began at 6:36 on the morning in question (R. 158). The car was located and Speakman testified that he dove down and attached the hooks to the undercarriage of the car (R. 159). Speakman testified that the front and rear windshields were intact and that the two back windows were rolled up and that the window in front on the passenger side was partially open. Speakman stated that it was too murky on the bottom to see inside the car. Speakman testified that the rear doors of the car had to be pried open because there was a latch screwed over the outside of the doors (R. 165 & 167). Speakman further testified that a body of a Negro female was discovered on the back seat of the car (R. 168).

Detective Shepherd of the homicide bureau of the Miami Police Department testified that he saw the car pulled out of the Miami River at approximately 10:15 in the morning (R. 241-242). Shepherd examined the car immediately after it was pulled out of the river and determined that the rear doors could not be opened. The rear doors had a latch prohibiting them from opening. Shepherd testified that the rear doors had to be broken into with a hammer. (R. 242). Shepherd explained the operation of the latch establishing that it could only be put in a locked position by someone actually screwing the guide screw and resetting it by screwing it back after the latch was put in locked position (R. 244). This establishes that the latch had to be put in the locked position by a human agency and could not accidently fall into that position. One of the latches taken from the car was identified and admitted into evidence (R. 251). Shepherd also testified that the distance from the entrance of the parking lot to the river edge where the car went in was fifty-eight (58) feet and that the only opening at the river edge where boats were otherwise solidly docked was seventeen (17) feet in width.

The State proved that the automobile in question belonged to the defendant and was purchased by him approximately *nine (9) hours* before it was driven into the river. Robert Simmons and Ed Griffin of Griffin Motors both testified that the defendant purchased the car in question some time between five and six o'clock on the evening of May 31, 1958 (R. 217-234). The prior owner of the car, Henry M. Paula, testified that he had traded the car in question to Griffin Motors in May, 1958 and that the car had the ornaments or latches attached to it at that time. Paula testified that the latches did not obstruct the

opening of the rear doors and that they were solidly fixed to the car (R. 237).

The State proved through the testimony of two insurance agents, namely Paul Gilman Smith of the Independent Life and Accident Insurance Company and Louis Bromberg of the United Insurance Company of America, that the defendant was the beneficiary of an insurance policy on the life of the defendant (R. 184-227). The insurance policies provided for Seven Thousand Five Hundred Dollars ($7,500.00) in the event of accidental death. The insurance agents testified that the defendant paid the premiums and that they were current.

The State proved that at the time the defendant was seeing and subsequently living with the deceased he was cavorting with one Lucille Williams, promising her that he was soon to come into some money and that he would marry her and take her to New York (R. 278-290). A friend of the defendant's, J. D. Reid of Haines City, where the defendant and the deceased formerly lived, testified that the defendant on several occasions stated that he did not like the deceased but that he needed her money to advance his boxing career. The defendant made it quite clear to Reid that all he wanted from the deceased was money. An example of Reid's testimony in that regard reads as follows (R. 182):

> "Well, George was constantly telling me that he didn't care anything for Minnie, didn't have any love nor likes for her. She had a job during the time. He needed money, he needed money to finish his boxing career. He could get anything he wanted from her. That was all he wanted from her was the money."

Up to this point in the evidence the state proved a case which pointed directly and convincingly to the conclusion that the defendant drove his car into the Miami River with the premeditated design to kill the deceased so that he could collect the insurance proceeds. The evidence clearly demonstrating the motive and the circumstances leaves no other reasonable hypothesis than that the defendant latched the rear doors of his car, closed the windows in the back of the car during the hot month of June with the deceased in the rear seat so that she could not escape, and directed the car into the river.

The State then introduced the defendants confessions which had been elicited prior to the conversation with Archie Langford. Counsel for the petitioner asks why the State was intent upon obtaining five confessions. In fact, the first four series of confessions were virtually one and the same. The confession was given orally and then transcribed by a stenographer (R. 393). The defendant asked to change it, but *only in regard to clarifying his motive for the killing*. The taped version was presented to the jury.

This confession, or series of confessions, however one views it, was challenged in the Florida Courts. A decision adverse to the defendant's claim was rendered by the Florida Supreme Court. *Milton v. State*, 125 So.2d 880 (Fla. 1960). The petitioner-defendant has never brought this matter before the federal courts for adjudication. Furthermore, *he has not presented this argument in his petition*. This Court has consistently ruled that matters not raised by the petition are not before this Court for consideration. *Namet v. United States*, 373 U.S. 179

(1963); *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960); *Lawn v. United States*, 355 U.S. 339 (1958); *National Licorice Company v. National Labor Relations Board*, 309 U.S. 350 (1940); United States Supreme Court Rule 40 (d) (2).

The Federal District Court recognized this vital fact in its own decision, stating:

> "Finally, it should be pointed out that even if the trial judge had excluded this oral confession, the jury would still have had the benefit of an earlier tape recorded confession by Milton, which was played twice at the trial, once out of the hearing of the jury, and subsequently in evidence. This confession was given several weeks prior to the oral confession in the jail cell. Milton was warned of his applicable Constitutional rights before he made the recorded confession. Although Milton argued at his trial that this earlier confession was also involuntary, he has not pressed that claim in this habeas corpus proceeding. 306 F.Supp. 939 (So. Dist. Fla. 1969).

That Court provided the petitioner with a full hearing regarding the voluntariness of the statements to Langford. However, such a hearing was clearly more of a courtesy than a necessity in view of the uncontested earlier confessions. This Court is in the very same position. If the statements of Langford were declared inadmissible, the petitioner would still have failed to establish a basis for a new trial.

II

ASSUMING ARGUENDO THAT THE QUESTION OF THE ADMISSIBILITY OF THE PRIOR CONFESSIONS WILL BE REVIEWED BY THIS COURT, THE VOLUNTARINESS OF THE PRIOR CONFESSIONS WAS APPROPRIATELY DETERMINED BY PROCEDURES SPECIFICALLY AUTHORIZED BY THIS COURT.

The State would reiterate that (1) the petitioner was advised of his rights prior to interrogation; (2) the prior confessions were deemed admissible by the State Courts; (3) they were not subsequently challenged in the Federal Courts; (4) thereby making the issue of the voluntariness of the statements to Langford academic. If, however, the issue of the voluntariness of the earlier confessions is to be reviewed by this Court, the validity of the Circuit Court's ruling is clearly demonstrable.

It is extremely important to note that the State trial court employed a procedure approved by this Court in *Jackson v. Denno*, 378 U.S. 368 (1964) for determining the voluntariness of the earlier confession. A procedure was employed by the Dade County Circuit Court Judge which was designed to give the defendant every fundamental consideration of fairness. It is worth mentioning that this procedure had been outlined by the Florida Supreme Court in *Graham v. State*, 91 So.2d 662 (Fla. 1956), a full five years before *Jackson v. Denno*, and remains today as the appropriate procedure for determining voluntariness of confessions.

First, the Judge excused the jury and heard extensive testimony on both direct and cross from both prosecution and defense before determining that the confession was voluntary. The Judge then submitted the confession to the jury to allow them to decide what weight, if any, should be given to the confession. He specifically told them that they could disregard the confession if they felt it was involuntary. Finally, the Judge instructed the jury that if they did believe the confession to be voluntary, they should nevertheless, consider it with great caution (R. 642).

The petitioner was unsuccessful in his attack upon that earlier confession in proceedings before the Florida Supreme Court. That Court correctly reconstructed and approved of the procedures employed in the trial court. Obviously the petitioner was unable to challenge in the Federal Courts a procedure specifically approved by the United States Supreme Court. No challenge to that procedure was raised in the Federal Courts, nor is any challenge to that procedure raised by the petitioner for a writ of certiorari addressed to this court, *nor is the procedure in any way challenged by the brief of counsel for the petitioner.*

In the absence of any allegations or prior determination that the trial court's procedure constituted error, the voluntariness of the earlier confession has been settled. Therefore, it is not necessary to inquire into the voluntary character of the earlier confession once again.

Counsel for petitioner does seek to challenge the voluntariness of that confession. *He does so without challenging the procedure employed to arrive at the conclusion on the trial level.* The State would suggest that this omission is fatal to his argument, and that the judgment that the earlier confession was voluntary must stand. Nevertheless,

we will discuss that testimony which supported the conclusion on the trial level.

When the State was about to introduce the defendant's confession, the jury was excused (R. 387). The court then conducted a lengthy hearing and heard the evidence on both sides (R. 387-505). The evidence presented to the court outside of the jury's presence established that William P. McClure and Warren D. Holmes, both detectives in the Miami Police Department were present when the defendant confessed on June 11, 1958. Holmes testified that he began questioning the defendant on June 11, 1958, at 4:58 in the afternoon (A. 109; R. 422-423). At the commencement of the interview Holmes advised the defendant that he was inquiring into the death of the deceased, Minnie Claybon, that he, the defendant, had the right to counsel and did not have to answer any questions unless he wanted to (A. 110; R. 423). The defendant was asked if he understood and he responded that he did (A. 110; R. 424). From five o'clock until six-thirty Holmes discussed boxing with the defendant. The defendant stated that "people thought he was going to be a second Joe Louis". After detective McClure arrived the defendant was questioned for approximately one hour, between 6:30 p.m. and 7:30 p.m., when Holmes and McClure went to dinner. The defendant expressed the desire to remain in Holmes' office rather than be returned to his cell and that request was granted (A. 111; R. 424-425).

The officers returned at 8:30 p.m., and brought the defendant some hamburgers and a bottle of coca-cola (A. 111; R. 425). At 8:30 p.m. the interview was resumed by Holmes while McClure remained in an observation room watching and listening to the examination. Holmes ex-

plained that there was a tape recorder that could be turned on from the observation room. Holmes further testified that the defendant was not threatened, mistreated, or offered any reward or promise of leniency in order to secure the confession (A. 111; R. 424-425). McClure testified that he saw the defendant on the day in question, namely, June 11, 1958 at approximately 6:30 p.m. when he observed for a few minutes from the observation room the discussion between Holmes and the defendant (A. 92; R. 386). McClure corroborated the time schedule testified to by Holmes. McClure testified that when he observed the defendant he appeared "very relaxed", "seemed to be comfortable", and "was answering questions easily" (A. 93; R. 387). McClure corroborated Holmes' testimony about leaving for dinner and that they brought the defendant two hamburgers and a coca-cola (A. 93; R. 388). McClure also corroborated Holmes' testimony that the defendant preferred remaining in Holmes' office which was more comfortable than his cell and that the request was granted (A. 93; R. 388).

McClure advised the defendant when he first spoke to him at 6:30 p.m. of the nature of the inquiry and that the defendant would not have to answer any questions and that his answers could be used against him in future court proceedings. According to McClure the defendant answered the questions without refusal (A. 94; R. 389). McClure remained in the observation room and turned the recording machine on at approximately nine o'clock when the interview began to treat the case at hand (A. 96; R. 390-391). McClure testified that the defendant expressed a desire to tell his story and get it off his chest so that he could clear himself with God. McClure's testimony reads as follows (A. 96; R. 392):

> "I walked into the room and I said, 'Hello, George.' George said, 'Hello, Mr, McClure.' I sat down and he started to tell me, 'Mr. McClure, I want to tell you this, I want to get it off my chest. It is been on my mind for a long time, and I would like to clear myself with God'.—words to that effect."

The defendant then confessed the killing of Minnie Claybon. After the defendant confessed he was requested to repeat the story to a stenographer who would prepare a written statement (A. 96; R. 393). The defendant was once again warned of his constitutional rights and his confession was recorded by a stenographer (A. 96-97; R. 393-394).

The stenographer transcribed the confession while in the interim the defendant was taken to a physician for an examination. (A. 97; R. 394). Upon returning, the prepared statement was read aloud to the defendant, he read it again himself and initialed typographical errors. The defendant was told to initial each page if it was correct and sign the entire statement at the end if the entire statement was correct. The defendant was also told to write a statement in his own handwriting indicating that the statement was true (A. 97; R. 394). McClure testified that the defendant signed the statement and followed the procedure described (A. 97; R. 394). It was made extremely clear by McClure that there were no offers of reward or threats made in order to secure the defendant's confession.

Doctor Joseph H. Davis, Medical Examiner for Dade County, testified that he was requested on the evening of June 11, 1958 to examine the defendant. Dr. Davis testi-

fied that he performed a physical examination of the defendant which lasted approximately ten minutes. Dr. Davis testified that the defendant freely submitted to the examination (R. 417). Dr. Davis asked the defendant if he had been abused in any way and the defendant stated "No". Dr. Davis explained that the defendant was thoroughly examined and had not been physically abused (R. 418). Dr. Davis further testified that the defendant appeared mentally normal, quiet, reserved and showed no signs of being under emotional strain. Dr. Davis further testified that the defendant stated to him that he felt better since he had told the police the truth (R. 418). Dr. Davis' testimony in part reads as follows (R. 417-418):

"A He said it was all right to examine him.

Q What did you do?

A I examined him. First I asked if he had been abused in any way. He said no. I asked him to take off his shirt and I examined him from the waist up, and I saw no marks of injury. As I recall, he put his shirt back on and took his trousers and underdrawers off and I examined the lower half of his body and saw no marks or any evidence of injury.

Q Did you have any further conversation with him at that time?

A Yes. In the course of the conversation, he himself told me that he felt better that he had told the truth. Now, I did not go into details with him as to what he said or what truth he had told, but that in essence is what he said.

Q In your opinion as a doctor, do you feel that George Milton was in any way harmed when you were examining him?

A No, I saw no evidence of injury.

Q How did he appear mentally to you?

A Mentally, perfectly all right. He was quiet, reserved. I didn't see anything particular about him that would lead me to suspect he was under any particular emotional strain."

Detective Shepherd of the Miami Homicide Bureau testified that he spoke to the defendant for the first time on June 1, 1958 (R. 486). On that date the defendant complained of a shoulder injury and was taken to the hospital and not turned over to the police until June 2, 1958 (R. 492). Shepherd testified that he only questioned the defendant on two occasions (R. 487). On the first occasion, June 1, 1958, the questioning lasted for 20-30 minutes (R. 488). On the second occasion, on June 6, 1958, the interrogation was lengthy and lasted for approximately six hours (R. 488), but on cross-examination Shepherd explained that the six hour questioning dealt with an entirely different case. Shepherd explained that the defendant was being held on instructions from Bartow, Florida as well as on instructions from the State of Mississippi where there was an outstanding warrant for the defendant (R. 494-495). Cross-examination of detective Holmes established that he questioned the defendant on three occasions, namely, June 3rd, 4th and the 11th, 1958, when the confession in issue was taken (A. 115; R. 426). The questioning on June 3, 1958 actually was conducted by two doctors who administered truth serum to the defendant and spoke to him for approximately forty-five minutes.

(A. 112; R. 427). On the occasion of June 4, 1958, the defendant was questioned with the aid of a polygraph, commonly referred to as a lie detector, from 1:15 to 2:30 in the afternoon (A. 114; R. 429). McClure testified that he questioned the defendant twice, that is, on June 11, 1958 and on June 5, 1958 for a period of one and one-half hours. (A. 98; R. 396).

The defendant testified before the court and gave his version of the circumstances attending the taking of his confession. The defendant claimed that he was questioned for long hours almost every day after he was taken into custody on June 1, 1958 (A. 123; R. 444-446). The defendant's testimony, however, reveals that he could only recall being questioned specifically on June 3, 1958 which he states is the first time that he was questioned, and on June 4, 1958, and on June 11, 1958 (A. 123; R. 447). The defendant testified that he was given drugs on June 3, 1958 and underwent a polygraph test on June 4, 1958 (A. 124; R. 448-449). The defendant testified that Holmes accused him of not telling the truth and threatened him that he would be taken for a ride in the country (A. 127; R. 452-453). The defendant claims that he was scared and that Holmes actually twisted his arm and pushed him around the room and continued threatening him and that it was under these circumstances that he confessed (A. 127-128; R. 453-457). The defendant also claims contrary to the testimony of Dr. Davis that he was not physically examined but merely asked how he felt (A. 131-132; R. 461-462). On cross-examination the defendant denied stating the matters and things that the tape recording, which was played to the court, reflects that he did say (A. 135; R. 467-468). The defendant also claims that McClure and Holmes did not bring him hamburgers and a coke (A. 138; R. 473).

The court was deeply concerned with this conflicting testimony and questioned the defendant (A. 139-144; R. 475-483). The court was apparently interested in the number of times the defendant was questioned, but *the defendant could not tell the court any time that he was questioned other than on the third, fourth and eleventh* of June, 1958. The defendant's answers to the court were indeed evasive. Exemplary of that is the following (A. 141-142; R. 478-479):

"THE COURT: You weren't questioned between the 4th and the 11th?

THE WITNESS: I could have been.

THE COURT: Not could have been. Were you or weren't you? You were there, you know about it. You are the only one that can tell us.

THE WITNESS: From the fourth day to the eleventh, I believe that I was questioned. I mean, I was trying to think. I believe that I was questioned some time during the time from the 4th to the 11th of June, but I just remember the 11th.

THE COURT: Well, do you know anybody that questioned you between the 4th and the 11th, anyone of the detectives anybody else, anywhere, anytime, between the 4th and the 11th? You tell me if anybody did that, and, if so, when and for how long a time.

THE WITNESS: I will try and remember the best I can. During the time I remember being

questioned, but I was questioned lots of times. I just can't say directly how long each time because —

THE COURT: Just tell me one time between the 4th of June and the 11th of June on which you were questioned. Just one time, and by whom.

THE WITNESS: Detective Shepard, I believe, sir.

THE COURT: What day did he question you, if you remember?

THE WITNESS: I don't remember what day.

THE COURT: For how long a period of time?

THE WITNESS: Maybe an hour, hour and a half.

THE COURT: Maybe an hour or an hour and a half. Is that the only time you remember between the 4th and the 11th?

THE WITNESS: That I remember, sir."

At the conclusion of this lengthy hearing outside the presence of the jury the trial court concluded that the confession was admissible and pointed out specifically that the court had carefully observed the defendant's demeanor and was convinced that the confession was voluntarily given. The court's observation is couched in the following language (R. 497):

"—From listening to the testimony, I might say, particularly after looking at your defendant testifying, observing him while he was testifying, observing his demeanor on the witness stand, and listening very carefully to his testimony throughout, I am convinced that the statement that he had given in this case was one of a voluntary nature."

III

ASSUMING ARGUENDO THAT THIS COURT DOES REVIEW THE EARLIER CONFESSIONS AND DOES DECIDE THAT THE INAPPROPRIATE PROCEDURES WERE EMPLOYED TO DETERMINE THE VOLUNTARY NATURE OF THOSE EARLIER CONFESSIONS, THE PRINCIPLE OF RIGHT TO COUNSEL ENCOMPASSED BY *MASSIAH* SHOULD NOT BE EXTENDED TO APPLY TO PETITIONER'S LATER CONFESSION TO ARCHIE LANGFORD.

A. The main doctrine of the *Massiah* decision was that the defendant's right to counsel had been violated. The strong dissent of three justices, authored by Justice White, pointed out that a substantial minority of the Court had serious doubts as to whether or not there was any violation of the right to counsel in *Massiah*.

With that strong dissent in mind, the State would suggest that there is no justification for an extension of *Massiah* beyond that immediate factual situation. To apply the holding in *Massiah* to these facts would constitute an

unwarranted extension of the doctrine of right to counsel. It would seriously undermine the ability of the State to introduce any evidence volunteered by a defendant.

The situation in *Massiah* was one in which the defendant had a conversation with a co-defendant who was well known to him. He knew that he was not conversing with a stranger wherein the risk of disclosure would be apparent. In this case, the defendant, Milton, was conversing with a total stranger. He *volunteered* the information to that stranger. The fact that this individual was a policeman is immaterial, since this stranger could just as well have testified against him if he were a bona fide prisoner..

An extension of *Massiah* to this situation, or to similar situations, would create absurd consequences out of the specific holding in that case. If Archie Langford were not a police officer, but turned State's evidence, would his testimony have been inadmissible? If a prison guard asked the defendant a question, received an answer, and then testified in Court, would this be a violation of the Sixth Amendment rights of the defendant? What if a policeman standing in the corridor overheard the defendant answering the question of a cellmate? Would that information be inadmissible as a violation of the right to counsel?

It should be apparent from the questions above and the implied answer, that the mere absence of counsel on a particular occasion should not render a statement inadmissible. Any extension of that basic doctrine beyond the fact pattern of *Massiah* would create a highly undesirable precedent.

B. It must be noted that an extensive hearing was granted to the petitioner in regard to the voluntariness of his confession. (R. 387-505) This procedure employed by the trial court, as in the case of the other confessions was totally consistent with the principles outlined by this Court in *Jackson v. Denno*, supra. Petitioner has failed to effectively challenge those procedures.

C. At the time of the hearing on the voluntariness of the confession, petitioner contradicted the very facts regarding the voluntariness of the confession which he now asserts as a basis for relief. He claimed that Officer Langford asked him about the crime only *once* (R. 324, 327). He stated that no coercion or pressure of any kind had been exercised.

The petitioner presents no explanation for his implied repudiation of his own testimony. Further, he presents no authority for the proposition that a defendant may allege one version of the facts at trial, and different version of the facts to suit his appellate purposes. Any relief granted to the prisoner under such circumstances would have to be either (1) based on the wrong set of facts, or (2) a reward for perjury.

IV

IF THIS COURT DEEMS IT NECESSARY TO CONSIDER THE *MASSIAH* DECISION, DESPITE THE PRECEEDING ARGUMENTS, THE PRINCIPLE OF THE NON-RETROACTIVITY OF *MASSIAH* SHOULD BE UPHELD.

A. The petitioner's request for a retroactive application of Massiah is couched in rather strange language. He argues that a "normal," that is, retroactive, application should be approved. It is obvious, however, that a normal application of any legislation or court ruling is prospective. Of the vast number of precedent setting judicial decisions, only a handful have been applied retroactively.

Therefore, petitioner is asking this Court to establish an exception, rather than follow a rule. However, he has failed to establish any sound basis for that exception. At least four Federal Circuits have expressly ruled against retroactive application of *Massiah*, and none have ruled otherwise. The Fifth Circuit has so ruled in *Milton v. Wainwright*, supra. (1970) and earlier had applied the non-retroactivity principle to *Lyles v. Beto*, 363 Fed.2d 503 (1966). The Third Circuit followed this ruling in *U.S. ex rel. Allison v. New Jersey*, 418 F.2d 332 (1969), and in *U.S. ex rel. Dickerson v. Rundle*, 430 F.2d 462 (1970). The Second Circuit had ruled similarly in *U.S. ex rel. Romano v. Fay*, 360 F.2d 389 (1966). The Seventh Circuit in *U.S. ex rel. Long v. Pate* agreed, and accurately stated the test to be applied:

> "Basing our decision on the extent which the condemned practice affects 'the integrity of the truth-determining process,' Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1779, 16 L.Ed. 2d 882 (1964), and weighing such finding against the prior justified reliance upon the old standards and 'the impact upon the administration of justice', Stovall v. Denno, 388 U.S. 293, 298, 87 S.Ct. 1967, 1970, 18 L.Ed. 2d 1199 (1967), we agree with the other circuits which have faced the question of *Massiah's* retroactivity, and hold it to be not retroactive." 418 F.2d 1028

It is important to note that the question is not, therefore, largely undecided as petitioner contends. It has been decisively decided against the petitioner. Also worth emphasis is the judicial notice given to prior reliance upon the investigative practices at issue in both the passage cited immediately above, and in the *Milton* decision rendered by the Fifth Circuit. In *Milton* the Court pointed out that the techniques employed had been approved in *Young v. United States*, 107 F.2d 490 (5th Cir. 1939). This, creates serious doubts about petitioner's assertion that this was not a common practice. The fact would appear to be that surreptitious methods of investigations were quite common, and that retroactive application of *Massiah* would result in a plague of appeals by those previously incarcerated based upon assorted types of confessions. This Court also recognized these heretofore acceptable practices in *Johnson v. New Jersey*, 384 U.S. 719, 731:

> Prior to Escobedo and Miranda, however, we had expressly declined to condemn an entire process of in-custody interrogation because of such conduct by the police. See *Crooker v. California*, 357 U.S. 433, 2 L.Ed. 2d 1448, 78 S.Ct. 1287 (1958); *Cicenia v. Logay*, 357 U.S. 504, 2 L.Ed. 2d 1523, 78 S.Ct. 1297 (1958). Law Enforcement authorities fairly relied on these prior cases no longer binding, in obtaining incriminating statements during the intervening years preceding Escobedo and Miranda.

The petitioner seeks a reversal of every Circuit which has ruled on this question. He further desires that in this case, a rare and abnormal procedure be applied, namely retroactive application of a case to an earlier cause. His

reasons for reversing the unopposed view of four Circuit Courts, and for applying an extremely rare doctrine are based upon highly questionable distinctions. The arguments he presents are based upon no apparent authority. His intricate argument based upon his own premises establishes at most some partial correlations. These partial and coincidental correlations in no way reveal the basis for the application of retroactivity.

This Court has been quite explicit on the subject. In *Johnson v. New Jersey*, 384 U.S. 719, 728, (1966), this Court stated:

> "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved."

There is, then, no magic formula, no precise mathematical correlation, which permits us to determine when retroactivity might be permitted. However, there were standards set forth by this Court, and these standards do not correspond completely to those asserted by the petitioner. In *Desist v. United States*, 394 U.S. 244, 249 (1969) these helpful guidelines were presented:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law

> enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Applying the standards of *Stovall v. Denno*, supra; *Johnson v. New Jersey*, supra., and *Desist*, four Circuit Courts decided that Massiah should not be applied retroactively. Petitioner has failed to effectively challenge the rationale, the application of facts to those rationale, or the final results of those decisions. Likewise, the warnings required by *Miranda v. Arizona*, 384 U.S. 436, (1966), the ruling in *Escobedo v. Illinois*, 378 U.S. 478, (1964), and the right to counsel at pretrial identifications, *Gilbert v. California*, 388 U.S. 263, (1967); *United States v. Wade*, 388 U.S. 218, (1967), have been held prospective due to official reliance on previous standards and the potential burden to the judicial system.

The question of retroactivity will also be afforded by the availability of other means of evaluating the truth of a confession. Refusing to apply *Miranda and Escobedo* retroactively, this Court said in *Johnson v. New Jersey*, 384 U.S. at 729

> "We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

With this in mind, it is important to recall that the State trial court provided the petitioner with ample protection. There was first a hearing before the judge, and then a second determination of the voluntariness by the jury.

The petitioner in a habeas corpus proceeding is entitled to present evidence anew on the voluntariness of confessions, *if* a full and fair hearing has not been afforded previously. *Townsend v. Sain*, 372 U.S. 293 (1963). The Fifth Circuit has ruled that a full and fair hearing was afforded in this case. *Milton v. Wainwright*, 428 F.2d 463 (1970). *The petitioner has not even alleged*, let alone proved, the invalidity of that ruling. Therefore, there would clearly seem to be no basis for new relief to be granted to the petitioner.

B. There is still another reason for affirming the non-retroactive application of Massiah.

It is crucial to note that any Massiah situation would by its very nature have to fall within the province of Escobedo and Miranda as well. Since *Escobedo and Miranda* are *not* retroactive, a new ruling in favor of the retroactivity of *Massiah* would result in hopeless confusion (and perhaps some legal schizophrenia).

V

A REVIEW OF THE PROCEDURES EMPLOYED IN THE LOWER COURTS EXPLICITLY SUPPORTS THE CONCLUSION THAT DEFENDANT'S STATEMENTS TO ARCHIE LANGFORD WERE VOLUNTARY AND ADMISSIBLE.

Once again, it should be pointed out that even if there were authority for the proposition that petitioner's confessions to Langford were involuntary, the earlier confessions recorded by Officers Holmes and McClure still stand.

Therefore, admission of Officer Langford's testimony would merely be harmless error. Whether that authority would be *Massiah*, or *Davis v. North Carolina*, 384 U.S. 737 (1966) as petitioner contends alternatively, the same conclusion applies.

Petitioner's second point requests an evaluation of the voluntary nature of his confession applying the test set forth in *Davis*. This is, indeed, a curious argument in view of the petitioner's testimony at his trial. At the trial *Milton explicitly denied that any kind of physical or psychological pressure had been exerted.* In fact, he said that Langford had only raised the question of the crime one time. The pertinent passages appear below:

> Q Did you ever talk to him about the facts of your case?
>
> A I never mentioned anything except he only mentioned it once, to be honest and truthful. He only mentioned it once; just one time.
>
> Q Did he ever mention, "What are you in jail for?"
>
> A I said, "Well, it is bad enough as it is. I don't want to talk about it. That was the only time he even mentioned it. After that— (A. 57; R. 324)
>
> * * *
>
> Q During that course of time, did he ever wake up in the night to talk to you?
>
> A No, we never talked at night whatsoever. Matter of fact, I always be just setting down thinking, I mean, we never even talked too much, to be honest and truthful about it. We never

talked too much about anything and he only mentioned it once, about my case. I just told him just like it were. I was feeling bad enough. (A. 58; R. 326-327)

* * *

THE COURT: Did he ever threaten you in any manner while he was in there?

THE WITNESS: No.

THE COURT: Did he ever promise you anything?

THE WITNESS: We never talked.

THE COURT: Did he promise you anything if you would do any talking, regardless of whether you said anything or not?

THE WITNESS: He didn't make any promise to me whatsoever. (A. 59; R. 327)

The petitioner's own version of what had happened in the cell is totally inconsistent with his current argument that the guilty plea was coerced. He seeks on appeal to assert facts which he, himself, denied at the trial. On this basis alone, the adjudication of the voluntariness of the confession should be upheld.

It should also be affirmed because neither the facts in *Davis v. North Carolina*, nor the rule promulgated therein, dictate a reversal. In the *Davis* case this Court pointed out that when a full and fair hearing has *not* been held regarding the voluntariness of a confession, new

evidence may be presented as to voluntariness. This Court cited *Townsend v. Sain*, 372 U.S. 293, (1963) for that proposition. Under those circumstances Davis was entitled to obtain a review of the voluntariness of his confession.

It must be noted that Davis had not been afforded the same procedural safeguards afforded by the State of Florida to the petitioner Milton. In *Davis v. North Carolina*, 253 N.C. 86, 116 S.E. 2d 365 (1966), it was pointed out that the question of the voluntariness of the confession was *not* resubmitted to the jury for their consideration as to voluntariness. At Milton's trial, both judge and jury dealt with that issue, and decided it in a manner adverse to the petitioner. In view of this important difference, it was certainly appropriate for the lower courts to uphold the findings of the trial court.

The facts in *Davis* are also quite different. There is strong evidence in that case of physical pressures being placed upon the prisoner. During his period of incarceration, the prisoner lost 15 pounds. This was primarily due to a limited diet consisting of little more than two sandwiches per day. Secondly, the prisoner in that case was taken by police officers to the scene of the crime—a graveyard—in a dramatic 5 a.m. confrontation, and on a second occasion as well.

To establish that the confession was involuntary, petitioner must meet the test established by this Court's innumerable early decisions. The basic requirement is that a confession must be the product of rational intellect and free will rather than being induced by conduct of state officials which might tend to overbear the defendant's

will to resist, thus constituting coercion. *Townsend v. Sain*, 372 U.S. 293 (1963); *Bynum v. State of Illinois*, 373 U.S. 528 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961).

Viewed from the defendant's own testimony at the trial there is no possible way to infer that his statements were the product of coercion. Viewed from the standpoint of the State's witness, Archie Langford, there is little that could support such a conclusion. Langford was "armed" with candy bars, offers of shared oatmeal, and absurd accusations (such as the accusation that Milton had raped his own wife). Despite petitioner's valiant efforts to conjure out of those bare facts the framework for a coerced confession, no overbearing pressure is apparent. There was no exertion of any type of physical force. There were no threats and no promises. There was no grueling or extensive questioning.

Petitioner seeks to bolster his argument by reference to violation of a Florida Statute (901.23). Certain correlative facts, however, must be related to the State's failure to take the prisoner to a magistrate immediately. After the prisoner was hospitalized and then incarcerated for this particular crime, the police were asked to hold him for investigation in regard to other matters for both Polk County, Florida and the State of Mississippi. (R. 494-495). This must be coupled with rulings of Florida, and the Fifth Circuit Court of Appeals, that mere violation of that Statute does not of itself establish that evidence obtained in the interim was involuntary. *Young v. Wainwright*, 326 F.2d 255 (5th Cir. 1964); *Milton v. Cochran*, 147 So.2d 137 (1963), certiorari denied 375 U.S. 869.

CONCLUSION

For the reasons stated, the respondent prays that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to PROFESSOR NEIL P. RUTLEDGE, Duke University Law School, Durham, North Carolina 27706, this ____ day of October, 1971.

J. ROBERT OLIAN
Assistant Attorney General

MILTON v. WAINWRIGHT, CORRECTIONS DIRECTOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70-5012. Argued January 12, 1972—Decided June 22, 1972

Petitioner in this habeas corpus proceeding challenged on Fifth and Sixth Amendment grounds the introduction at his trial of a post-indictment, pretrial confession he made to a police officer posing as a fellow prisoner. The denial of habeas corpus relief is affirmed without reaching the merits of petitioner's claims; any possible error in the admission of the challenged confession was harmless beyond a reasonable doubt in light of three other unchallenged confessions and strong corroborative evidence of petitioner's guilt. *Harrington* v. *California*, 395 U. S. 250; *Chapman* v. *California*, 386 U. S. 18. Pp. 372–378.

428 F. 2d 463, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 378.

Neil P. Rutledge, by appointment of the Court, 403 U. S. 951, argued the cause and filed a brief for petitioner.

J. Robert Olian, Assistant Attorney General of Florida, argued the cause for respondent *pro hac vice*. With him on the brief was *Robert L. Shevin*, Attorney General.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ of certiorari on claims under the Fifth and Six Amendments arising out of the use of one of a number of confessions, all of which were received in evidence over objection. The confession challenged here was obtained by a police officer posing as an accused person confined in the cell with petitioner.

Petitioner Milton is presently serving a life sentence imposed in 1958 upon his conviction of first-degree murder following a jury trial in Dade County, Florida. During that trial, the State called as a witness a police officer who, at a time when petitioner had already been indicted and was represented by counsel, posed as a fellow prisoner and spent almost two full days sharing a cell with petitioner. The officer testified to incriminating statements made to him by petitioner during this period. Contending that the statements he made to the officer were involuntary under Fifth Amendment standards and were obtained in violation of his Sixth Amendment rights as subsequently intepreted in *Massiah* v. *United States*, 377 U. S. 201 (1964), petitioner initiated the present habeas corpus proceeding in the United States District Court for the Southern District of Florida. The District Court, finding that petitioner had exhausted his state remedies in the course of several post-conviction proceedings in the Florida courts, ruled against petitioner on the merits of his claim, holding that his statements to the police officer were not inadmissible on Fifth Amendment grounds and that his Sixth Amendment claim could not prevail since "[n]o Court has declared *Massiah* retroactive, and this Court will not be the first to do so." 306 F. Supp. 929, 933. The Court of Appeals affirmed the denial of relief to petitioner, 428 F. 2d 463.

On the basis of the argument in the case and our examination of the extensive record of petitioner's 1958 trial, we have concluded that the judgment under review must be affirmed without reaching the merits of petitioner's present claim. Assuming, *arguendo*, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U. S. 250 (1969); *Chapman* v. *California*, 386 U. S. 18 (1967). The jury, in addition to hearing the challenged

testimony, was presented with overwhelming evidence of petitioner's guilt, including no less than three full confessions that were made by petitioner prior to his indictment. Those confessions have been found admissible in the course of previous post-conviction proceedings brought by petitioner in his attempts to have this conviction set aside, and they are not challenged here.

The crime for which petitioner was convicted occurred in the early morning hours of June 1, 1958. The woman with whom petitioner had been living was asleep while riding as a passenger in the rear seat of an automobile driven by petitioner; she died by drowning when the car ran into the Miami River with its rear windows closed and its rear doors securely locked from the outside with safety devices designed to ensure against accidental opening of the doors. Petitioner, who jumped from the car shortly before it reached the water, was nevertheless propelled into the river by the car's momentum; he was recovered from the water when a seaman nearby heard his cries for help and found him clinging to a boat moored in the river near the point of the automobile's entry. A few hours later the car, with the victim's body still inside, was retrieved from the bottom of the river a short distance downstream from its point of entry.

The following day the Miami police arrested petitioner on manslaughter charges and placed him in the city jail. Ten days after the woman's death, petitioner, having been advised of his right to remain silent, confessed that he had deliberately killed the woman and that the accident was simulated. He first made an oral confession to a police officer during a question-and-answer exchange that was preserved on a wire-recording device. He then repeated his confession during another exchange and these statements were taken down by a stenographer; after this stenographic recording was converted to a transcript, peti-

tioner read it over in full and signed it at 11 p. m. on June 11.[1]

The following day, petitioner told a police officer that he would like to make some clarifying additions to the statements in the writing he had signed the previous night. The officer suggested that they first go with a photographer to the scene of the incident, "and reconstruct how this thing . . . occurred." Petitioner agreed. He, the police officer, and a photographer then went to the scene of the crime where petitioner pointed out the route he had taken in driving the car to the river, the approximate point at which he had jumped out of the car, and the point of the car's entry into the river. Petitioner was then taken back to the police station where he went over his statement of the night before and indicated to the officer the parts of that statement he wanted to clarify. Once again, a stenographer was summoned and a question-and-answer exchange was taken down and transcribed to a writing that petitioner read over and signed.[2]

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[1] In this first written confession, petitioner made the following statements:

"Minnie Lee Claybon [the murder victim] and myself had an insurance policy together. So I started thinking about the insurance and the money that I could get if something happened to her. I knew that I could use the money if something happened. So I decided to do something about it one way or the other, so one night we had been riding around in the car. So I decided to get the whole thing over with. So I drived the car into the river and she was killed.

". . . I drove the car straight toward the river, and just as I got almost to the river, . . . I jumped from the car and the car went on into the river and I skidded and kept rolling over and over until I was in the river also. I hurt my shoulder. I couldn't move that arm. It was hurting real bad."

[2] In this second writing, petitioner confirmed in major part the statements he had made the night before, but said in addition that he had "decided to kill" the woman "about a month before this

Approximately one week after he had made these confessions, petitioner secured the services of an attorney who advised him not to engage in any further discussions of his case with anyone else.

Following this, and while petitioner was under indictment and confined in the Dade County jail awaiting trial, the State, for reasons that are not altogether clear, assigned a police officer named Langford the special detail of posing as a prisoner and sharing petitioner's cell in order to "seek information" from him.

Langford entered the cell with petitioner late one Friday afternoon and presented himself as a fellow prisoner under investigation for murder; he assumed a friendly pose toward his cellmate, offering petitioner some of his prison food at their first breakfast together the next morning and telling petitioner something of his own fictitious "crime," which he described as a robbery committed with an accomplice who had used Langford's gun to kill the robbery victim. Finally, petitioner began to boast that he had not made Langford's mistake of having an accomplice who might later serve as a witness; instead, he said, he had committed the "perfect" crime with no surviving witnesses. By the time Langford left the cell on Sunday afternoon, petitioner had described his own crime in some detail and had predicted with much assurance that he would soon be released, that he would collect a lot of insurance money, and that he would then flee the State with the insurance money without ever being brought to trial for his "perfect" crime. The incriminating statements made to Langford were essentially the

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incident happened." He further stated, however, that he was not thinking of the insurance money when he made that decision, but was thinking instead of the woman's habits of associating with other men, drinking too much, and staying out late at night. He reaffirmed in express terms that he had deliberately driven the car into the river with the intention of killing the woman.

same as those given in the prior confessions not challenged here.

At petitioner's trial in state court, the wire recording of his first confession was played back, first to the judge for a ruling on its admissibility, and then to the jury. Petitioner's two written confessions were also received in evidence, as were the photographs that were taken and the statements that were made by petitioner when he reconstructed the crime at the scene of its occurrence. In addition, Langford was permitted to testify to the statements made to him by petitioner while the two men were sharing the cell in the county jail. Other evidence, highly damaging to petitioner in its totality, was also presented to the jury. For example, there was testimony that petitioner had told an acquaintance a few months before the murder that he disliked Minnie Claybon (the murder victim) and was interested only in getting some money out of her. The terms of certain insurance policies purchased by petitioner about two months before the crime were described in testimony given by the selling insurance agents; the policies provided for the payment of $8,500 to petitioner upon the accidental death of Miss Claybon, and the agents testified that petitioner had faithfully maintained his weekly premium payments on the policies. Other testimony, however, indicated that petitioner was hard pressed for money shortly before the murder, having fallen behind in his rent payments and having sold some of his personal clothing to raise small sums. There was testimony that petitioner had purchased the car in which Miss Claybon drowned on the very afternoon before the crime, making a cash down payment of $8; that the safety devices on the rear doors of the car had been left in the unlocked position by the car's former owner; that these devices could be put in the locked position only by loosening a screw, sliding the

locking device into position, and then retightening the screw; and that these devices were found securely screwed in the locked position when the car, with the victim's body, still inside, was recovered from the river. After hearing all the evidence, the jury found petitioner guilty of murder in the first degree, but recommended mercy; on that recommendation, the trial judge imposed the sentence of life imprisonment.

The petitioner has made a number of collateral attacks on his conviction, primarily in the courts of Florida. In response to one of his applications for post-conviction relief, the Florida Supreme Court issued a writ of habeas corpus, heard oral argument on the voluntariness of petitioner's wire-recorded and written confessions, but thereafter discharged the writ in a reported decision upholding the voluntariness of those confessions and their admissibility at trial. *Milton* v. *Cochran*, 147 So. 2d 137 (Fla. 1962), cert. denied, 375 U. S. 869 (1963). The issues raised in that proceeding are not now before us and must, for the purposes of the instant case, be treated as having been properly resolved by the Florida Supreme Court. Cf. Sup. Ct. Rule 23 (1)(c).

In initiating the present habeas corpus proceeding in the District Court, petitioner sought to have his conviction set aside on the ground that the statements he made to police officer Langford should not have been admitted against him. Our review of the record, however, leaves us with no reasonable doubt that the jury at petitioner's 1958 trial would have reached the same verdict without hearing Langford's testimony. The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14

years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

Under the guise of finding "harmless error," the Court today turns its back on a landmark constitutional precedent established 40 years ago. That precedent, which clearly controls this case, is *Powell* v. *Alabama*, 287 U. S. 45. I respectfully dissent.

In 1958 a Florida grand jury indicted the petitioner, George Milton, for first-degree murder. This was an offense punishable by death under Florida law. After he had been indicted, Milton was remanded to the Dade County jail to await trial. He had retained a lawyer, who had advised him not to talk about his case with anyone.

Some two weeks later the State directed a police officer named Langford to enter Milton's cell, posing as a fellow prisoner also under indictment for murder, in order to "seek information" from Milton. Langford entered the cell on a Friday evening. That night he "tried to open him [Milton] up," but Milton refused to talk about his case. The next day Langford devoted his efforts to gaining Milton's confidence. He shared his breakfast with Milton and gave him candy. He talked convincingly about his own purported crime. He tried to steer the conversation to the charge against Milton, but Milton repeatedly said he did not want to talk about it, and had been told not to talk about it by his lawyer. Finally, sometime between midnight and 3 a. m. on Sunday, after almost 36 hours of prodding

by his supposed fellow prisoner, Milton allegedly confessed the murder to Langford.

At Milton's subsequent trial, Langford, over objection, was allowed to testify in detail to this alleged confession. Milton was convicted, and, upon the recommendation of the jury, he was not sentenced to death, but to life imprisonment. His appeals to the state appellate courts were unavailing, and he ultimately filed the present federal habeas corpus proceeding in the United States District Court for the Southern District of Florida, claiming that his conviction was invalid because he had been deprived of his constitutional right to the assistance of counsel after the indictment.

The District Judge denied the writ, apparently believing that the question before him was whether this Court's decision in *Massiah* v. *United States*, 377 U. S. 201, was "retroactive":

> "This case was tried six years before the Supreme Court indicated in Massiah v. United States, 377 U. S. 201 . . . (1964), that confessions are involuntary *per se* if induced by officers or their agents from an accused after his indictment while he is without assistance of counsel. No Court has declared *Massiah* retroactive, and this Court will not be the first to do so. Counsel for Milton argues that *Massiah* was not declared retroactive because far from stating new principles of law, it merely restated principles derived from Powell v. Alabama, 287 U. S. 45 . . . (1932). However, the *Powell* case dealt with the Sixth Amendment right to appointment of counsel in a capital case, a situation far different from this case. Milton knew what he was doing. He wasn't intimidated by the police, because he didn't even know his cellmate was a policeman. He had a lawyer who had told him not to make any statements concerning

his case, but he chose not to follow that advice." 306 F. Supp. 929, 933–934.

The Court of Appeals for the Fifth Circuit affirmed *per curiam* "on the basis of [the District Court's] opinion," 428 F. 2d 463, and we granted certiorari, 403 U. S. 904.

The District Court and the Court of Appeals were in error. They were mistaken, first, in thinking that the *Massiah* case had anything to do with the "voluntariness" of a confession. They were mistaken, second, in thinking that any real question of "retroactivity" was presented. They were mistaken, third, in thinking that *Powell* v. *Alabama*, *supra*, dealt only with "appointment of counsel in a capital case." And they were mistaken, fourth, in thinking that *Powell* v. *Alabama* was inapplicable to this case.

Powell v. *Alabama*, decided almost 40 years ago, was one of the truly landmark constitutional decisions of this Court. It held that under the Fourteenth Amendment a man indicted for a capital offense in a state court has an absolute right, not "to appointment of," but to the *assistance* of counsel. And that constitutional right is not restricted to the trial. The Court reversed the convictions in *Powell*, because:

> "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." 287 U. S., at 57.

In *Massiah* v. *United States*, *supra*, we found that

this constitutional right to counsel[1] was violated, when, after indictment, a defendant who had a lawyer was surreptitiously interrogated alone by an agent of the police. "[U]nder our system of justice," we said, "the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.' . . ." "[A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. . . ." "This view," we said, "no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*, 287 U. S. 45." 377 U. S., at 204–205.

The "retroactivity" of the *Massiah* decision is a wholly spurious issue. For *Massiah* marked no new departure in the law. It upset no accepted prosecutorial practice. Its "retroactivity" would effect no wholesale jail deliveries. Cf. *Tehan* v. *Shott*, 382 U. S. 406, 418–419. In no case before *Massiah* had this Court, at least since *Powell* v. *Alabama*, ever countenanced the kind of post-indictment police interrogation there involved, let alone ever specifically upheld the constitutionality of any such interrogation.[2]

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[1] *Massiah* involved a federal non-capital felony charge, where the defendant had an absolute Sixth Amendment right to counsel under *Johnson* v. *Zerbst*, 304 U. S. 458. The same absolute right was secured by *Gideon* v. *Wainwright*, 372 U. S. 335, to defendants in non-capital state criminal cases under the Sixth and Fourteenth Amendments. This constitutional guarantee has now been further extended. See *Argersinger* v. *Hamlin*, *ante*, p. 25.

[2] An issue of the "retroactivity" of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the de-

For four decades this Court has recognized that when a State indicts a man for a capital offense, the most rudimentary constitutional principles require that he be afforded the full and effective assistance of counsel:

> "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. . . .
>
> "Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed. *Powell* v. *Alabama*." *Spano* v. *New York*, 360 U. S. 315, 327 (concurring opinion).

So the question in this case is not whether *Massiah* is "retroactive," [3] for the rule in that case has been settled law ever since *Powell* v. *Alabama*.

I can find no basis for the Court's holding today that the admission of Officer Langford's testimony was harmless. In *Chapman* v. *California*, 386 U. S. 18, we said that an "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant

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cision overrules clear past precedent, *e. g.*, *Linkletter* v. *Walker*, 381 U. S. 618; *Desist* v. *United States*, 394 U. S. 244; *Williams* v. *United States*, 401 U. S. 646; or disrupts a practice long accepted and widely relied upon, *e. g.*, *Johnson* v. *New Jersey*, 384 U. S. 719; *Stovall* v. *Denno*, 388 U. S. 293; *Cipriano* v. *City of Houma*, 395 U. S. 701.

[3] Even on the erroneous premise that the "retroactivity" of *Massiah* is here involved, the District Court was quite mistaken in stating that "[n]o Court has declared *Massiah* retroactive." This Court, in *McLeod* v. *Ohio*, 381 U. S. 356, reversed, citing *Massiah*, an Ohio conviction because a voluntary confession was admitted in evidence that had been obtained when police officers questioned the petitioner in the absence of counsel a week after he had been indicted. The conviction antedated *Massiah* by almost four years.

cannot, under *Fahy* [*Fahy* v. *Connecticut*, 375 U. S. 85], be conceived of as harmless." 386 U. S., at 23–24. And on the question of whether a jury might possibly have been influenced, the State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24.

Neither the District Court nor the Court of Appeals even suggested the possibility of harmless error in this case, and with very good reasons. The Court today relies on the fact that the challenged "confession" was only one of several introduced at the petitioner's trial. But it fails to mention that each of the previous statements was taken during an 18-day period after arrest but before indictment, when the petitioner was held in jail incommunicado and was questioned almost every day, often for hours at a time. For 10 days the petitioner denied that he had deliberately killed his wife. Finally, during a session in which two detectives working in tandem questioned him continuously for some eight hours, the petitioner allegedly confessed. Other statements followed that one, but all were taken during the period of incommunicado detention.

Under these circumstances, it is hardly surprising that the Miami police chose to plant an officer in the petitioner's jail cell two weeks after indictment, in the hope of obtaining admissions less tainted by the indicia of unreliability that surrounded the previous statements. They succeeded in doing so, and the alleged confession thus obtained was truly devastating to the defense at the trial. Langford's testimony was the first evidence of any incriminating statements introduced by the State at the trial, and it was referred to repeatedly by the prosecutor in his final argument.

The state courts determined that the petitioner's pre-indictment statements were voluntary, and that issue, as the Court notes, is not now before us. But the weight

given by a jury to any alleged confession is affected by the circumstances under which it was obtained, and the ability of the petitioner to discredit in the minds of the jury the evidence of his prior statements was undoubtedly destroyed by the strong corroboration and elaboration supplied by the testimony of Officer Langford, who had been unconstitutionally planted in the petitioner's jail cell. Surely there is *at the least* a reasonable doubt whether in these circumstances the introduction of Langford's testimony did not contribute to the verdict of first-degree murder returned by the jury, particularly where a conviction for a lesser degree of homicide was a distinct possibility on the evidence.

To hold otherwise, in the absence of any finding of harmless error by any of the four courts that have previously ruled on the admissibility of Langford's testimony, is to violate the very principle that the Court restates today: "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but rather to review for violation of federal constitutional standards." *Ante,* at 377.

Despite its admonition, the Court today refuses to rule on the constitutional question squarely presented in this case. That question is whether the great constitutional lesson of *Powell* v. *Alabama* is to be ignored. I would not ignore it, but would honor its "fundamental postulate . . . 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Powell* v. *Alabama,* 287 U. S., at 71–72.

For these reasons, I would reverse the judgment before us.